95-1622

No. _____

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1995

B. J. GURLEY, doing business as
MOLTAN COMPANY, a sole proprietorship,

*Petitioner,*

v.

ROBERT SWAIM,

*Respondent.*

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

I.

Was the ruling of the Court of Appeals, affirming the District Court's exercise of personal jurisdiction over Moltan Company and refusal to set aside a Default Judgment in Robert Swaim's Age Discrimination lawsuit, notwithstanding Mr. Swaim's failure to comply with Indiana state law prerequisites for personal service of process, in such conflict with the decisions of this Court, the other Courts of Appeals, and the Court of last resort in Indiana as to call for the exercise of this Court's supervisory power?

II.

Does a Court deny a Defendant due process of law, by refusing to set aside the entry of a default judgment, when the Defendant's Rule 60(b) Motion makes a timely attempt to have a case decided on its merits, as opposed to an attempt to totally avoid the jurisdiction of the Court?

## LIST OF PARTIES

The Petitioner is B. J. Gurley, doing business as MOLTAN COMPANY, a sole proprietorship with its principal place of business in the State of Tennessee. Mrs. Gurley is a resident of the State of Florida. The Respondent is Robert Swaim. Mr. Swaim is a resident of the State of Indiana.

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## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit appears in that Court in Case No. 94-3931 and has been published at 73 F.3d 711 (7th Cir. 1996). The Judgment of the United States District Court, Southern District of Indiana, Indianapolis Division, appears in that Court in Civil Action No. IP93-742-C and has not been published.

## JURISDICTION

B. J. Gurley, doing business as Moltan Company, a sole proprietorship, petitions this Court for a Writ of Certiorari to review a judgment entered in the United States Court of Appeals for the Seventh Circuit on January 8, 1996. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND RULES OF PROCEDURE INVOLVED

This case involves the personal service of process requirements under state law necessary to subject a non-resident defendant to the personal jurisdiction of the United States District Court. The Due Process Clauses of Amendment 5 and Amendment 14 to the Constitution of the United States, the provisions of FRCP Rule 4(e)(1) and Indiana Trial Rules 4.1, 4.4, 4.6, 4.10, 4.15 and 4.16, are involved in this case.

## STATEMENT OF CASE

On December 23, 1992, Robert Swaim ("Swaim") filed a charge of age discrimination against his former employer, Moltan Company ("Moltan") with the Equal Employment Opportunity Commission ("EEOC") in Indianapolis, Indiana, resulting from Moltan's August 14, 1992, termination of his employment. (App. 57). On December 24, 1992, the EEOC notified Moltan that Swaim's charge had been filed and requested Moltan to provide a statement of its position by January 30, 1993. On January 20, 1993, Moltan's controller, to whom the EEOC had sent its Notice of Charge of Discrimination, wrote the EEOC alleging that Swaim's termination resulted from his declining sales and denying that age had any bearing on Swaim's termination. (App. 27-28).

On June 9, 1993, Swaim's attorney wrote the EEOC requesting that it cease processing Swaim's charges because "he has decided to initiate suit against Moltan Company in the Southern District of Indiana." In that letter, Swaim's attorney requested copies of all documents received in connection with the EEOC's investigation of Swaim's charge. In late June of 1993, Swaim's attorney received copies of the EEOC documents, including the correspondence from Moltan's controller. (App. 24).

On June 7, 1993, Swaim filed suit against Moltan in the United States District Court, Southern District of Indiana, Indianapolis Division (the "District Court"), under the Age Discrimination In Employment Act, 29 U.S.C. §§ 621, et seq. (App. 23). Jurisdiction of the District Court was invoked pursuant to 29 U.S.C. § 626(c) and 28 U.S.C.

§ 1331. Swaim alleged nothing in his Complaint to indicate Moltan's legal status or capacity. Swaim's attorney made no attempt to serve Moltan with a copy of the Complaint and Summons by regular mail, pursuant to FRCP Rule 4(d)(2). (App. 48). Instead, on June 7, 1993, Swaim's attorney mailed a copy of the Complaint and Summons to "B. J. Gurley, Moltan Company, 3555 Moltan Drive, Memphis, Tennessee 38115," by certified mail, return receipt requested, in an attempt to obtain personal service pursuant to Indiana Trial Rule 4.1. (App. 24 & 29). In late June, 1993, the certified mail envelope containing the Complaint and Summons was returned by the U.S. Postal Service with the notation "unclaimed." (App. 24 & 29).

In August of 1993, Swaim's attorney arranged for a private process server to attempt service of a copy of the Complaint and an Alias Summons upon Mrs. Gurley at Moltan's business office in Memphis, Tennessee. (App. 24). On August 11, 1993, the process server went to 3555 Moltan Drive, Memphis, Tennessee and asked for Mrs. Gurley. (App. 24-25). Jean Black, Mrs. Gurley's secretary, spoke with the private process server, because Mrs. Gurley was still not in the office. (App. 53). The process server attempted to serve the Complaint and Summons on Jean Black, but she advised the process server that she was not authorized to accept personal papers for Mrs. Gurley. (App. 25 & 53). Nevertheless, the process server dropped the Summons and Complaint at Ms. Black's feet and left. (App. 25 & 54). Ms. Black attempted to return the papers to the departing process server, but she was unsuccessful. (App. 54) Ms. Black then mailed the Complaint and Summons back to the process server. (App. 25,

33 & 54). The process server returned an affidavit prepared by Swaim's attorney which provided: "[T]hereafter copies of the documents were mailed by prepaid, first class mail on ___ from ___;" however, no entries were inserted by the process server to indicate that the documents were delivered by "follow-up mail." (App. 30). The process server returned a second affidavit confirming that Jean Black had mailed the Complaint and Summons back to the process server. (App. 33). The process server also returned the Alias Summons noting "Served personally upon the defendant. Place where served: 3555 Moltan Drive, Memphis, TN." (App. 35).

On September 3, 1993, apparently recognizing that Moltan had not been served, Swaim's attorney caused a copy of the Complaint and Summons to be served the Indiana Secretary of State, on the theory that Moltan had designated the Secretary of State as agent for service of process pursuant to the provisions of Indiana Trial Rules 4.4 and 4.10 (App. 25). At Swaim's request the Secretary of State mailed the Summons and Complaint to Mrs. Gurley at Moltan by certified mail, return receipt requested, but that certified mailing was returned by the U.S. Postal Service on September 14, 1993, marked "unclaimed." (App. 26). No "follow-up service" by first class mail was sent to Mrs. Gurley or Moltan as required by Indiana Trial Rule 4.1(B). (App. 49).

On December 28, 1993, Swaim's attorney filed a Request for Clerk for Entry of Default in the District Court, enclosing his affidavit containing his service attempts and the affidavit of an employee in his office. (App. 21). In the Request for Entry of Default, Swaim stated that the Defendant was served on September 3,

1993, by serving the Indiana Secretary of State. (App. 21). However, Swaim's attorney represented: "I believe that Moltan was effectively served when, on August 11, 1993, the Summons and Complaint were left at the feet of Jean Black, secretary to Moltan's chief executive officer, B. J. Gurley." (App. 26). No allegation regarding the legal status or entity of the Defendant appeared in the Request for Entry of Default, nor was there a distinction whether service of process was obtained on B. J. Gurley or Moltan. (App. 21). No reference was made to Swaim's failure to effect follow-up service by first class mail as required by Indiana Trial Rule 4.1(B), after the August 11, 1993 attempt to serve Mrs. Gurley. Swaim's attorney further represented that: "[e]ven if that were not effective service 'Moltan' was incontrovertibly served on September 3, 1993 through its agent for service of process, the Indiana Secretary of State." (App. 26). Again no reference was made to Swaim's failure to effect "follow-up service" by first class mail as required by Indiana Trial Rule 4.1(B). (*Id.*) Swaim's attorney did mail a copy of the Request for Entry of Default to Mrs. Gurley at Moltan by first class mail on December 28, 1993, marking the first time Mrs. Gurley or Moltan had been notified by first class mail of the pendency of Swaim's District Court lawsuit. (App. 22 & 49).

On December 29, 1993, the District Court Clerk entered the requested default and forwarded notice of that entry to Swaim's attorney and to Mrs. Gurley at Moltan by first class mail. (App. 37 & 52). On January 12, 1994, Swaim's attorney filed a Motion for Default Judgment. (App. 38). On January 18, 1994, the District Court made the express finding that "the defendant has been

properly served despite its willful attempts to avoid service of process in this matter," and "awarded judgment against the Defendant, Moltan Company in the amount of $197,733.04" plus attorney fees. (App. 43). Copies of the Default Judgment were forwarded to Swaim's attorney and to Mrs. Gurley at Moltan by first class mail. (App. 44).

After reviewing the Request for Entry of Default and the Entry of Default, Mrs. Gurley contacted Moltan's attorney. (App. 50). On January 21, 1994, Moltan's attorney telephoned Swaim's attorney requesting a copy of Swaim's Complaint and related papers, which Swaim's attorney forwarded on January 22, 1994 by Federal Express. (App. 50). On January 28, 1994, Moltan's attorney filed his appearance and a Motion to Set Aside Entry of Default and Default Judgment and to Permit Late Filing of Answer. (App. 69). A copy of Moltan's proposed Answer was attached to its Motion. (*Id.*) Moltan's attorney also submitted for filing a Memorandum and the Affidavits of Mrs. Gurley and Jean Black, setting forth the facts as outlined by Moltan above. (App. 46).

On November 23, 1994, the District Court entered its order and opinion denying Moltan's motion and allowing the default judgment to stand. (App. 65 & 66). In its opinion, the District Court restated its earlier finding that the "Defendant actively evaded such service." (App. 70). On December 8, 1994, after filing a timely appeal to the United States Court of Appeals for the Seventh Circuit (the "Court of Appeals"), Moltan filed a cash supersedeas bond which was approved by the District Court to stay execution on the Default Judgment. (App. 82).

On January 8, 1996, after examining the record and the parties' briefs, and after hearing and oral argument, the Court of Appeals entered its judgment and opinion affirming the District Court and allowing the Default Judgment to Stand. (App. 1). In its opinion, the Court of Appeals made the express finding that Moltan forfeited its right to challenge the District Court's exercise of personal jurisdiction because it did not raise that challenge in its FRCP Rule 60(b) Motion. (App. 4).

## ARGUMENT

### I

**Certiorari should be granted to ensure that when reviewing a challenge to state law service of process, and the resulting exercise of personal jurisdiction, more than a superficial review of the alleged service of process will be conducted to determine whether there has been compliance with state law service of process rules and due process of law.**

In this case, the District Court formed its first impression of Moltan by taking at face value Swaim's assertions that he was the victim of age discrimination, that the service of process had been effected on two occasions on Moltan, and that Moltan had willfully attempted to evade service. Based upon those offensive assertions, the District Court exercised personal jurisdiction over Moltan and entered a substantial default judgment. (App. 43). Despite Moltan's cooperation in the EEOC administrative proceedings, Swaim made no attempt in the course of the District Court proceeding to verify the legal status of Moltan or to correspond by first class mail with Moltan or

its representative involved in the EEOC proceedings. Nevertheless, within days following its first actual notice of the lawsuit, Moltan moved the District Court to set aside the Default Judgment, to allow it to file an answer, and to allow the case to be decided on the merits. (App. 45).

Notwithstanding the express findings to the contrary in the Court of Appeals, Moltan made the following allegations in its Motion:

> "2. Service of process on Moltan was not properly obtained by Swaim.
>
> . . .
>
> 4. Because service of process was not obtained on Moltan, Swaim was not entitled to entry of a judgment, pursuant to FRCP Rule 55.
>
> . . .
>
> 6. Without proper service of process on Moltan, the judgment is void, and Moltan is entitled to relief from the judgment as contemplated by FRCP Rule 60(b)." (App. 45 & 46).

In its memorandum to the District Court, Moltan argued that Swaim made no attempt to obtain a waiver of service from Moltan under FRCP Rule 4(d). (App. 57). Moltan acknowledged that FRCP Rule 4(e)(1) permitted Swaim to utilize Indiana Trial Rules to obtain service of process over Moltan, but Moltan argued that the requirements of the Indiana Trial Rules had not been met to permit the Court to invoke personal jurisdiction over Moltan. (App. 61-63). Moltan also argued that Swaim's Complaint contained no allegation regarding Moltan's legal status or entity, and made no distinction whether

Moltan was a corporation, an organization, or a proprietorship, thereby creating confusion. (App. 63). Swaim's first attempt at service of process pursuant to Indiana Trial Rule 4.1(A)(1) by sending a copy of the Summons and Complaint to Mrs. Gurley at Moltan by certified mail, return receipt requested was unsuccessful because that certified mailing was returned by the U.S. Postal Service marked "unclaimed" and there was no "return" showing receipt of the letter as required by the Indiana Rule. Indiana Trial Rule 4.1(A)(1). Swaim made no attempt to provide follow-up service as required by the Indiana Trial Rule 4.1(B). Consequently, there was no service of process upon Mrs. Gurley or Moltan sufficient for the District Court to exercise its personal jurisdiction over Mrs. Gurley or Moltan. Indiana Trial Rule 4.1(B).

Swaim's second attempt at service on August 11, 1993, when a process server was sent to Moltan's business office in Memphis with an alias summons directed to Mrs. Gurley at Moltan was likewise unsuccessful and ineffective. The process server learned from Jean Black, secretary, that Mrs. Gurley was not in the office, and that Ms. Black had not been authorized to accept personal legal papers for Mrs. Gurley. Dropping the complaint and summons at the feet of Ms. Black, who had no authority to accept service of process, could not effect service on Mrs. Gurley or Moltan. Because the process server acknowledged in her affidavit that the complaint and summons had in fact been returned to her by Ms. Black, there was no evidence that the complaint and summons were ever delivered to or reviewed by Mrs. Gurley or Moltan. Despite the private process server's Affidavits of Service filed in the District Court, no follow-up service

was made as required by state law when service of process is attempted on a Defendant's agent. Indiana Trial Rule 4.1(B).

Swaim's third attempt at service of process when an Alias Summons and Complaint was delivered to the Indiana Secretary of State, on the theory that by transacting business in the State of Indiana, Mrs. Gurley and Moltan had designated the Secretary of State as agent for service of process, was likewise unsuccessful and ineffective. Indiana Trial Rule 4.4(A)(1) & (B)(2); Indiana Trial Rule 4.1(A)(2). The Indiana Secretary of State forwarded the Summons and Complaint to Mrs. Gurley at Moltan by certified mail; however, that certified mail was returned by the U. S. Postal Service marked "unclaimed." Again, no follow-up service was made by Swaim as required by state law when service of process is attempted on an "agent." Indiana Trial Rule 4.1(B).

The District Court had clearly made up its mind based upon Swaim's Motion for Default Judgment that Moltan had "willfully evaded service of process and must have been flaunting the authority of the courts. The District Court paid no attention to the affidavits submitted by Moltan to remind the District Court that personal service had not been effected upon Moltan or Mrs. Gurley and chose not to carefully analyze the actual service attempts to verify whether the technical requirements of the Indiana Trial Rules had been met or not. It should have been obvious that Swaim totally ignored his duties of "follow-up service" imposed by Indiana Trial Rule 4.1(B). The District Court nevertheless reiterated its offensive conclusions that Moltan had willfully evaded service of process, that Moltan had been effectively served, and

that Swaim therefore must have been the victim of age discrimination, when it denied Moltan's Motion to Set Aside the Default Judgment. Likewise, the Court of Appeals chose to adopt the offensive findings of the District Court, chose not to carefully analyze the actual service attempts to verify that the service requirements of the Indiana Trial Rules had been met, and chose to stand behind the District Court.

## II

**The Court of Appeals ruling that service of process was proper conflicts with this Court's precedent, its own precedent, as well as with precedent decisions of a majority of the other circuits, that the letter of state law requirements for service of process must be met before jurisdiction over the person can be exercised.**

This Court has ruled that valid service of process is a prerequisite to a District Court's exercise of personal jurisdiction over a defendant, and the District Courts are strictly bound in such cases involving service of process pursuant to state law by the letter of that state law and are without authority to fill whatever interstitial gaps a given case may illuminate. *Omni Capital Intl. v. Rudolph Wolff & Co., Ltd.*, 484 U.S. 97, 103, 108 S.Ct. 404, 409, 98 L.Ed.2d 415 (1987). The majority of the Courts of Appeals have consistently applied the above principles set forth in *Omni Capital*. The First Circuit has ruled that a defendant's actual notice of proceedings was insufficient to support a District Court's exercise of jurisdiction over him where service is attempted pursuant to state law, absent a showing that service of process requirements of state law had been substantially complied with. *Precision*

*& Findings, Inc. v. LGP Gem, Ltd.*, 953 F.2d 21, on remand 152 F.R.D. 433 (1st Cir. 1992). The Second Circuit has ruled that when service of process is made pursuant to FRCP 4(e)(1) authorizing service of process in accordance with the provisions of state law, federal courts have no authority to stray from the requirements of state law. *New York State National Organization of Women v. Terry*, 961 F.2d 390 (2nd Cir. 1992); cert. granted, vacated, *Pearson v. Planned Parenthood Margaret Sanger Clinic*, ___ U.S. ___, 113 S.Ct. 1233, 122 L.Ed.2d 640 (1993), judg. reinstated 996 F.2d 1351; cert. granted, vacated, ___ U.S. ___, 114 S.Ct. 2776, 129 L.Ed.2d 888 (1994); on remand, 41 F.3d 794 (2nd Cir. 1994). In its original opinion the Second Circuit correctly stated as follows:

> "Service of process must comply not only with Constitutional requirements, but with the provisions of the state statute. '*FDIC v. Shaffer*, 731 F.2d 1134, 1136 (4th Cir. 1984).' Numerous federal courts have refused to exercise jurisdiction over parties who were not served with the pertinent state statute. See, e.g., *Recreation Properties, Inc. v. Southwest Mortgage Service Corp.*, 804 F.2d 311, 314-15 (5th Cir. 1986); *National Trust for Historic Preservation v. 1750 KINV Partnership*, 100 F.Rd 483, 485-6 (E.D. Va. 1986); Aff. Mem. 755 F.2d 927, 929 (4th Cir. 1985)." *Id.*

The Seventh Circuit had previously ruled that liberal construction of service rules cannot be utilized as a substitute for plain legal requirements of rules with respect to the manner in which service of process may be had. *U.S. v. Mollenhauer Laboratories, Inc.*, 267 F.2d 260 (7th Cir. 1959). The Seventh Circuit had also ruled that failure to serve a non-resident motorist in strict compliance with a

state's non-resident motorist act would be the equivalent of no service of process over the non-resident motorist and that court would have no power of statutory revision over the service of process requirements. *Johnson v. Burkeen*, 930 F.2d 1202 (7th Cir. 1991).

The Eleventh Circuit has ruled that where strict requirements of a state's long arm statute were not met, attempted long arm service was insufficient to support a District Court's exercise of personal jurisdiction over the non-resident defendant. *American Steel Building Co., Inc. v. Davidson & Richardson Const. Co.*, 847 F.2d 1519 (11th Cir. 1988).

## III

**The examination of service of process by the District Court and the Court of Appeals in this case was superficial and thereby resulted in the denial to Mrs. Gurley and Moltan of due process of law, because both courts ignored the express requirements of service contained in the Indiana Trial Rules, as well as their interpretation by the Indiana Supreme Court.**

Neither court could have found that Swaim's first attempt at service by certified mail resulted in service of process upon Mrs. Gurley or Moltan, because there was no return showing receipt of the letter. Indiana Trial Rule 4.1(A)(1). The Court of Appeals had previously recognized that mail service is ineffective if unacknowledged by the defendant. *Mid-Continent Wood Products, Inc. v. Harris*, 936 F.2d 297 (7th Cir. 1991).

Neither court could have found Swaim's second attempt at service upon Mrs. Gurley or Moltan by

attempting to serve Jean Black as an agent, resulted in service of process. Ms. Black's authority as an agent for service of process was expressly denied, there was no evidence that the Complaint and Summons were ever received by Mrs. Gurley or Moltan, and Swaim made no required follow-up service by regular mail. Similarly, neither court could have found Swaim's third attempt at service upon Mrs. Gurley or Moltan, by serving the Indiana Secretary of State as agent for service of process under the Indiana Trial Rule 4.4(B)(2), resulted in service of process, because Swaim again made no follow-up service as required by Indiana Trial Rule 4.1(B). In none of his three attempts to serve Mrs. Gurley or Moltan was Swaim able to show the court that his named defendant received notice of his pending age discrimination lawsuit as required by the Indiana Rules.

Reviewing courts must make a meaningful analysis of state law interpretation of its service of process rules. The Court of Appeals brushed aside Moltan's reference to *Washington v. Allison*, 593 N.E. 1273 (Ind. App. 1992), in which the Indiana court stated that a proprietorship must be served pursuant to Indiana Trial Rule 4.1, relating to service on individuals, not pursuant to Indiana Trial Rule 4.6, relating to service on organizations, because the Court of Appeals observed that the Indiana Court upheld service of process in *Washington*. *Washington* correctly observed that due process requires service of notice in a manner that is reasonably calculated to inform the defendant of the pending lawsuit, but *Washington* expressly noted that follow-up service by first class mail was effected on the defendant after a copy of the summons and

complaint had been served upon the defendant by certified mail. Had the Court of Appeals compared the service attempted in *Washington* to the service attempted in this case, it would have noted that none of Swaim's three attempts at service of process provided the first notice of the pendency of the lawsuit to Moltan required by the Indiana Trial Rules. Instead, Moltan's first notice of the pendency of the lawsuit came when Swaim's December 28, 1993 Request for Entry of Default was mailed to Mrs. Gurley at Moltan by first class mail.

In examining Moltan's challenge to service of process, the District Court and the Court of Appeals chose to ignore the reasoning of the Indiana Supreme Court in a surprisingly similar case that had recently been decided by that Court in a manner consistent with the position that Moltan has asserted throughout this case. *LaPalme v. Romero*, 621 N.E.2d 1002 (Ind. 1993). *LaPalme* involved a personal injury action where a non-resident and his employer at the time of the injury were named as defendants. Subsequent to the injury, the non-resident apparently left the employment of his former employer. A copy of the summons and complaint were later left with the manager of the non-resident's former employer. When the non-resident failed to answer, a default judgment was entered against him. The non-resident promptly filed a motion to set aside the default judgment; however, the trial court denied his motion. The non-resident then appealed the case to the Indiana Court of Appeals, which affirmed the trial court. The case was then appealed to the Indiana Supreme Court which reversed, finding that the trial court acquires jurisdiction over an individual defendant only when the summons is served in a manner

provided for in a trial rule setting forth recognized avenues for obtaining service over an individual defendant. *Id.* In *LaPalme*, the Indiana Supreme Court noted that the plaintiff had chosen to serve the non-resident defendant by attempting service at his former place of employment, as if the former employer was his agent. *Id.* While the District Court and the Court of Appeals in this case referenced Indiana Trial Rules 4.15(F) and 4.16, the Indiana Supreme Court noted in *LePalme* that nothing in those rules permitted leaving the summons and complaint at the place of business with the employer, who was not the agent of the non-resident defendant for purposes of service. *Id.*

Another Indiana appeals court has followed the similar logic that specific requirements must be met before one, such as Jean Black, a secretary, is determined to be the agent for service of process over a defendant. *Hardy v. Maldonado*, 632 N.E.2d 381, 382 (Ind. App. 1994). In *Hardy*, a pedestrian brought a personal injury action against the driver of an automobile and its owners. The owners of the vehicle were husband and wife, and the driver was their son. The plaintiff caused a summons and complaint to be served at the address of the husband and wife, but the returns of service reflected that the service of each of the three summons was only by delivery to the wife. The son and the father moved to dismiss, because they had not been personally served. The Indiana Appeals Court agreed that the father and son had not been served in accordance with the Indiana Trial Rules, and that leaving the summons and complaint with the wife was not effective service. *Id.* Based upon that case, the Indiana Appeals Court ruled that a wife/mother was not the

agent for service of process upon the father and the son. *Id.*

Other Indiana appeals court opinions have been careful not to establish agency for purposes of finding service of process. *Poteet v. Bethke*, 507 N.E.2d 652 (Ind. App. 1987); *Schafer by Schafer v. Lieurance*, 659 N.E.2d 229 (Ind. App. 1995). In both of those cases, Indiana courts had been asked to uphold service of process, and thereby personal jurisdiction, where a plaintiff in a personal injury action served an insuror, as agent for the insured, rather than serving the insured defendant. *Id.* In both of those cases, the Indiana courts ruled that service was defective and that personal jurisdiction over the insured defendants had not been obtained. *Id.* Other federal courts called upon to exercise personal jurisdiction over an individual defendant, where service of process was delivered to the defendant's secretary at his place of employment, have refused to find that a defendant's secretary under those circumstances is an agent for service, absent an express authorization. *West v. Page*, 835 F.Supp. 20 (DC Me. 1993); *LaMont v. Haig*, 539 F.Supp. 552 (DC S.D. 1982).

Unlike the District Court and the Court of Appeals, Indiana state courts when reviewing a challenge to service of process have conducted more than just a superficial examination of actual attempts at service, before determining whether personal jurisdiction has been obtained. In *Washington*, previously discussed, certified mail service was sent to a defendant at his business rather than at his home, with no return receipt requested,

but follow-up service was effected by regular mail. *Washington*, 593 N.E.2d at 1275. While that service was technically not correct, the Indiana court found through certified mail and follow-up first class mail, the requirements of due process had been met. *Id.* In *Washington* there were two effective services upon the defendant in a manner provided by Indiana Trial Rule 4.1, but in this case, there were none. In another Indiana personal injury accident case, a defendant sought to set aside a default judgment taken against him after service of process had been mailed by certified mail to an address that he had vacated three months earlier. *Mills v. Coil*, 647 N.E.2d 679, 681 (Ind. App. 1992). No mention was made regarding follow-up service by regular mail as required by Indiana Trial Rule 4.1(B), and the Indiana appeals court ruled that the default judgment should have been set aside, because service of process had not been effected pursuant to the requirements of state law. *Id.* Because Swaim did not effect personal service on Mrs. Gurley or Moltan in accordance with the requirements of the Indiana Trial Rules, the District Court lacked the personal jurisdiction to issue a binding judgment. *Overhauser v. Fowler*, 549 N.E.2d 71, 73 (Ind. App. 1990).

The Court of Appeals did make the following observations:

> "We will, however, set aside a default judgment as a per se abuse of discretion if the district court that entered the judgment lacked jurisdiction. *Bally Export Corp. v. Balicar, Ltd.*, 804 F.2d 398, 400 (7th Cir. 1986);

and

> "[W]e are obligated to vacate the default judgment as a per se abuse of discretion if we find it void for lack of jurisdiction. *Bally Export Corp., Id." Swaim v. Moltan Co.*, 73 F.3d 711, 716 & 718 (7th Cir. 1996); (App. 5 & 8).

The Court of Appeals took pains to affirm the District Court in this case, and in so doing it disregarded the plain requirements of Indiana Trial Rule 4.1(A) & (B). Despite its foregoing recognition of its duties, the Court of Appeals allowed a void default judgment to stand and thereby permitted a denial of due process to Mrs. Gurley and Moltan.

## IV

**The Court of Appeals has sanctioned the District Court's departure from Indiana service of process requirements to punish Moltan for its perceived disregard for the Judicial System, to award Swaim a windfall, and to thereby deprive Mrs. Gurley and Moltan of the due process guaranteed by the Fifth and Fourteenth Amendments to the Constitution.**

A comparison to *New York National Organization of Women*, previously, decided by this Court is appropriate in this case. *New York National Organization of Women, supra.* In that case, a New York Federal Judge, like the District Court in this case, concluded that abortion protesters had flaunted the Court's authority by apparently ignoring the Court's orders of injunctive relief. After reaching that conclusion, the Federal Judge, like the District Court in this case, imposed serious penalties against protesters. Like Moltan in this case, the protesters argued that state law service of process requirements had not

been met for purposes of subjecting them to the personal jurisdiction of the court. With no effective service of process, the protesters argued that the court had not acquired jurisdiction over them necessary to assess penalties and that the penalties against them were void. Regardless of whether the trial judge may have perceived the defendants as "flaunting" the authority of the court or the judicial system, this Court concurred that compliance with the requirements of state law service was a prerequisite to the exercise of personal jurisdiction over the defendants. Because the state law requirements for service of process had not been met as to the appealing protestors, the New York Court was precluded from punishing the appealing protesters. *Id.*

The conclusions of the District Court and Court of Appeals that Moltan willfully evaded service ignored the failure of Swaim to comply with requirements of Indiana's service of process rules, the timeliness of Moltan's responses to the EEOC, the timeliness of Moltan's response to the District Court after its first actual notice of the lawsuit, and the posting of a cash supersedeas bond. All of those factors indicated that Moltan was not attempting to avoid the authority of the District Court, deserved to have its service of process challenges meaningfully examined, and deserved its day in court. To allow the Default Judgment to stand, considering the questionable and ineffective attempts at personal service, will have the clear and practical effect of discriminating against Mrs. Gurley and Moltan in favor of Swaim, just because he had claimed discrimination. To grant Swaim the windfall of a substantial default judgment, under the circumstances of this case, will not only be an abuse of

due process, but an abuse of federal discrimination remedies as well.

## CONCLUSION

Courts were created to fairly and impartially resolve the disputes of parties. Courts should not exist to hand out rewards to the first party to appear at the Courthouse. Defaults are not favored. Where at all possible, Courts should hear both sides of a dispute and decide that dispute on its merits. In this case Moltan filed a Rule 60(b) Motion challenging the District Court's exercise of personal jurisdiction over it prior to effective service of process and requesting the opportunity to be heard on the merits. Moltan's Rule 60(b) Motion asked the District Court for permission to file the Answer submitted with its Motion that questioned whether the termination of Swaim's employment with Moltan was the result of age discrimination or job performance.

Moltan's Rule 60(b) Motion was filed in an attempt to obtain its day in court. The Motion was not filed as an attempt to avoid the exercise of jurisdiction by the Court or as an attempt to prevent the parties' dispute from being decided on the merits. Rather than examine whether service of process complied with the requirements of State law, and thereby whether the entry of default was appropriate to resolve this dispute, the District Court elected to penalize Moltan and preclude a disposition of this case on its merits. If Moltan had in fact delayed this proceeding or increased its cost, the case could still have been decided on the merits and other

remedies or sanctions could have been awarded. Moltan's cooperation in EEOC administrative proceedings, in promptly making an appearance after actual notice of the pendency of the lawsuit, in posting of a cash supersedeas bond, and in pursuing this case on appeal further evidence its intention, not to avoid a determination of the age discrimination issue, but to obtain its day in Court and to have the case decided on its merits.

The exercise of this Court's power of supervision is required, and the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

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No. 94-3931

ROBERT SWAIM,

*Plaintiff-Appellee,*

*v.*

MOLTAN COMPANY,

*Defendant-Appellant.*

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Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division.
No. 93 C 742 – **John Daniel Tinder,** *Judge.*

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ARGUED SEPTEMBER 11, 1995 – DECIDED JANUARY 8, 1996

Before BAUER, KANNE, and DIANE P. WOOD, *Circuit Judges.*

KANNE, *Circuit Judge.* Plaintiff obtained a default judgment in an action for wrongful termination of employment. Defendant appeals from both the default judgment and the district court's denial of its motion to vacate that judgment pursuant to FED. R. CIV. P. 55(c) and 60(b). The question before us is whether either of these two decisions manifests an abuse of discretion. We find that the district court exercised sound discretion in entering the default judgment and in denying defendant's motion for Rule 60(b) relief.

I

A

Moltan Company, which is based in Memphis, Tennessee, markets petroleum absorption products in Indiana and the several States. Moltan hired Robert Swaim on March 1, 1990, as a regional sales manager for the territory encompassing Alabama, Arkansas, Georgia, Kansas, Louisiana, Mississippi, Missouri, and Tennessee. Moltan later reconfigured Swaim's territory to include Alabama, Georgia, Kentucky, Indiana, Ohio, Tennessee, and West Virginia. Swaim alleges that Moltan initiated the reconfiguration, but Moltan claims the change accommodated Swaim's wish to move from Nashville, Tennessee, to Indianapolis, Indiana, so he could marry. Shortly after this reconfiguration, Moltan terminated Swaim on August 14, 1992, citing unsatisfactory job performance.

Swaim filed an administrative complaint with the Equal Employment Opportunity Commission ("EEOC") pursuant to 29 U.S.C. § 626(d)[1] on December 23, 1992, alleging that Moltan had terminated him because of his age in violation of 29 U.S.C. § 623(a). After receiving a right to sue notice from EEOC, Swaim filed a complaint and demand for jury trial in the Southern District of Indiana on June 7, 1993, seeking back pay, liquidated damages, and reinstatement. That day, Swaim's counsel mailed a copy of the complaint and summons by certified mail with return receipt requested to B.J. Gurley, the chief executive of Moltan, at Moltan's business address in

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[1] The current Code of Federal Regulations provides for such administrative complaints at 29 C.F.R. §§ 1626.5, 1626.6 (1995).

Memphis, Tennessee. The postal service returned the papers unclaimed, and Swaim's counsel then hired a private process server to deliver the papers personally to Moltan's office.

The process server arrived at Moltan's office on August 11, 1993, and Jean Black, B.J. Gurley's secretary, refused to accept the complaint and summons. The process server left the papers at Black's feet, and Black mailed the papers back to the process server's office. Swaim's counsel then delivered the complaint and summons to the Indiana Secretary of State on September 3, 1993, in accordance with Indiana Trial Rule 4.4, which nominates the Secretary of State as the agent of persons and organizations doing business in Indiana with regard to service of process. IND. CODE § 34, app. T.R. 4.4(B). The Secretary of State mailed the papers by certified mail with return receipt requested to Moltan at its Memphis address, and the papers were returned unclaimed on September 18, 1993.

The clerk of the district court entered default against Moltan upon Swaim's motion under FED. R. CIV. P. 55(a) on December 29, 1993. The district court subsequently ordered default judgment against Moltan in the amount of $197,733.04 and also awarded Swaim $4,681.75 in fees and costs. Moltan promptly filed a motion to set aside the default judgment according to FED. R. CIV. P. 55(c) and 60(b) on January 28, 1995.[2] Moltan asserted in its Rule

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[2] Moltan also requested leave to file an answer to Swaim's complaint, in which it set forth its allegedly meritorious defenses. The district court eventually denied this motion as moot in light of the its decision denying the requested Rule 60(b) relief.

60(b) motion that ineffective and "confused" service of process amounted to good cause for setting aside the judgment. It also claimed that the meritorious defenses articulated in its proposed answer would prevail should the case go to trial. The district court denied Moltan's motion on November 23, 1994. It concluded that Moltan had failed to show good cause for setting aside the default judgment because service of process had been substantially accomplished and Moltan had actively evaded such service.

B

Moltan filed its notice of appeal on December 2, 1994, from both the default judgment and the denial of the motion to set the default judgment aside. We have jurisdiction to address both the default judgment and the order denying Rule 60(b) relief. A motion for relief from judgment under FED. R. CIV. P. 60, if filed within ten days after the entry of judgment, resets the thirty-day period in which to file a notice of appeal. FED.R.APP.P. 4(a)(4)(F). The thirty-day clock prescribed by Rule 4(a)(1) then begins to run the day the district court rules on the Rule 60 motion. *United States v. Duke*, 50 F.3d 571, 574 (8th Cir.), *cert. denied*, 116 S.Ct. 224 (1995). Moltan filed its Rule 60(b) motion ten days after the default judgment and thus reset the default judgment appeal clock to begin running on November 23, 1994, when the district court entered its order denying Moltan's Rule 60(b) motion. We may therefore review both decisions of the district court. *See Glass v. Dachel*, 2 F.3d 733, 738 (7th Cir. 1993).

II

A

This court will reverse a district court's default judgment only upon finding an abuse of discretion. *Pretzel & Stouffer v. Imperial Adjusters, Inc.*, 28 F.3d 42, 45 (7th Cir. 1994). This standard of review reflects the district court's institutional position as the forum best equipped for determining the appropriate use of default to ensure "that litigants who are vigorously pursuing their cases are not hindered by those who are not" in an environment of limited judicial resources. *Johnson v. Gudmundsson*, 35 F.3d 1104, 1117 (7th Cir. 1994) (quoting *Stevens v. Greyhound Lines, Inc.*, 710 F.2d 1224, 1230 (7th Cir. 1983)). We will, however, set aside a default judgment as a *per se* abuse of discretion if the district court that entered the judgment lacked jurisdiction. *Bally Export Corp. v. Balicar, Ltd.*, 804 F.2d 398, 400 (7th Cir. 1986).

Moltan appeals from the default judgment raising an argument it did not include in its Rule 60(b) motion to the district court: that it is a legal nonentity incapable of being sued. Moltan devoted little attention to this claim either in its brief or at oral argument, and we are unable to divine the precise basis of this challenge. It appears to rest on one of two assertions. First, by contesting its amenability to lawsuit, Moltan may be challenging the district court's exercise of personal jurisdiction. Second, Moltan may be suggesting that it lacks the capacity to be sued contemplated by the drafters of FED. R. CIV. P. 17(b). We need not decipher this puzzle, however, because Moltan has forfeited both arguments by failing to raise either of them in its Rule 60(b) motion.

B

Moltan has forfeited the opportunity to contest the district court's exercise of personal jurisdiction. Generally, the failure to challenge personal jurisdiction in a responsive pleading amounts to a forfeiture of that claim. *Rice v. Nova Biomedical Corp.*, 38 F.3d 909, 914 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1964 (1995). A defaulted party, however, has not forfeited his jurisdictional challenge. *Reynolds v. International Amateur Athletic Fed'n*, 23 F.3d 1110, 1120 (6th Cir.), *cert. denied*, 115 S.Ct. 423 (1994). The nature of default accounts for this different treatment because a defaulted party has typically failed to appear or file an answer. *See, e.g., Stafford v. Mesnik*, 63 F.3d 1445 (7th Cir. 1995); *Pretzel & Stouffer*, 28 F.3d 42; *O'Brien v. R.J. O'Brien & Assocs., Inc.*, 998 F.2d 1394 (7th Cir. 1993). The defaulted party may ascribe this failure to flawed or nonexistent service of process or other factors that suggest the district court's lack of personal jurisdiction. This exception to the general forfeiture rule recognizes that it is unfair to strip parties of a defense that may explain the omission that is potentially the basis for judgment against them. A defaulted party may therefore challenge the district court's exercise of personal jurisdiction in a motion for Rule 60(b) relief. *Cf. International Harvester v. OSHRC*, 628 F.2d 982, 984 (7th Cir. 1980) (holding that issue preclusion does not obtain from a default judgment regarding issues not actually decided by the judgment).

A motion for relief under Rule 60(b) "does not affect the finality of a [default] judgment or suspend its operation." FED. R. CIV. P. 60(b). The addition of subsection (F) to FED. R. APP. P. 4(a)(4) supplements this proviso by suspending the running of the appeal period from an

otherwise final judgment until the disposition of a timely Rule 60 motion. Taken literally, these provisions would allow a party two avenues of appeal from a default judgment. For while an appeal from denial of Rule 60(b) relief is technically reviewed only on the grounds of the denial itself, the district court will have predicated its decision, in part, upon the reasons for which it ordered the original default. FED. R. APP. P. 4(a)(4)(F) therefore leaves the door ajar for a party to appeal directly from a default judgment on grounds wholly distinct from those iterated in its Rule 60 motion. And where, as in most cases, the party appeals from both the default and the denial of relief, there exists the possibility of divergent arguments on appeal.

The interplay of FED. R. APP. P. 4(a)(4)(F) and FED. R. CIV. P. 60(b) thus creates a potential problem in light of the different foci of reviewing default judgments and denials of motions to vacate. In reviewing a default judgment, we examine the merit of the judgment, while review of a denial of motion to set aside such a judgment involves only an inquiry into the actual denial of post-judgment relief – not into the merits of the predicate default judgment. *See Stafford*, 63 F.3d at 1450.

The problem arises when a defaulted party, after making a Rule 60(b) motion, appeals from the original default judgment on grounds different from those stated in his motion for Rule 60(b) relief, thereby putting before the court of appeals at least one argument that the district court neither heard nor addressed. To allow such a state of affairs would leave this court in the awkward position of reviewing a judgment for an abuse of discretion with respect to a jurisdictional challenge the district court

never considered. What sort of discretion was exercised? None, because the district court never heard the argument. We would therefore be reviewing no exercise of discretion for an abuse of discretion.[3]

Certainly, a party does not forfeit his right to appeal from a default judgment by virtue of making a motion under Rule 60(b). The default judgment remains viable for appeal subject to the time requirements of FED. R. APP. P. 4(a)(4)(F). This does not mean, however, that the Rule 60(b) motion should have no bearing upon the subsequent appeal from the default judgment. A direct appeal may pose questions of fact, as illustrated by the present case in which Moltan alleges that its status as a sole proprietorship makes it a legal nonentity and incapable of being sued. Such questions are the province of the district court.

These concerns have prompted this circuit to conclude that *in personam* jurisdictional challenges to default judgments are forfeited if not asserted in a Rule 60(b) motion, if such a motion is made. *O'Brien*, 998 F.2d at 1398-99; *Trustees of Central Laborers' Welfare Fund v. Lowery*, 924 F.2d 731, 732-33 (7th Cir. 1991) (per curiam); *In re State Exchange Finance Co.*, 896 F.2d 1104, 1106 (7th Cir. 1990). This forfeiture rule reflects the functional similarity between a personal jurisdictional challenge to a default

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[3] We recognize that a direct appeal from a default judgment could pose the same dilemma, but in such a case, we would likely remand the case to the district court for additional findings concerning the appellant's claim(s). This accords with our holding in the present case; the district court is the proper forum in which to air questions of fact.

judgment and a motion to dismiss for lack of jurisdiction under FED. R. CIV. P. 12(b)(2). A defense of lack of jurisdiction is forfeited if not asserted in a timely motion to dismiss under Rule 12 or a responsive pleading or amendment of such as provided by Rule 15. FED. R. CIV. P. 12(h);[4] *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, 456 U.S. 694, 703, 102 S.Ct. 2099, 2105 (1982). A motion to vacate under Rule 60(b) for lack of jurisdiction is essentially equivalent to a Rule 12(b)(2) motion to dismiss for lack of jurisdiction. The moving party is not asking that it be given a chance to defend on the merits; it is questioning the court's ability to require it to do so. If the district court finds itself without jurisdiction based upon the movant's 60(b) presentation, then it is obligated to dismiss the case because it has no authority over the defendant. The default judgment is void. *In re Joint Eastern & Southern Districts Asbestos Litigation*, 22 F.3d 755, 763 (7th Cir. 1994) (stating that lack of personal jurisdiction nullifies a judgment). If the court finds otherwise, the defaulted party can appeal the denial of Rule 60(b) relief, and we are obligated to vacate the default judgment as a *per se* abuse of discretion if we find it void for lack of jurisdiction. *Bally Export Corp.*, 804 F.2d at 400.

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[4] Although Rule 12 describes the effect of such failure as "waiver," the actual result is forfeiture, which is the failure to make a timely assertion of a right before a tribunal competent to determine such right. *Yakus v. United States*, 321 U.S. 414, 444, 64 S.Ct. 660, 677 (1944). Waiver, by contrast, is the "intentional relinquishment or abandonment of a known right." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938). *See also Freytag v. Commissioner*, 501 U.S. 868, 872 n. 2, 111 S.Ct. 2631, 2635 n. 2 (1991) (Scalia, J., concurring in part and in the judgment).

C

While this circuit has not addressed the precise issue, there is no logical basis for different treatment of the capacity issues addressed in Rules 9(a) and 17(b) of the Federal Rules of Civil Procedure. Questions involving a party's capacity to sue or be sued will likewise turn upon issues of fact – issues properly allocated to the forum of the district court. Like questions pertaining to personal jurisdiction, those involving capacity must therefore be identified in either a responsive pleading or motion. FED. R. CIV. P. 9(a). Failure to raise capacity in a responsive pleading amounts to forfeiture of that right. *Wagner Furniture Interiors, Inc. v. Kemner's Georgetown Manor, Inc.*, 929 F.2d 343, 345 (7th Cir. 1991). The Wagner court premised its holding upon the requirement in Rule 9(a) that capacity must be plead by "specific negative averment" and the harmonious interpretations of that language employed by several other circuits. *Id.* (collecting cases).

The pleading requirements for capacity thus correspond to those for personal jurisdiction. The forfeiture rule for capacity parallels the rule embodied in FED. R. CIV. P. 12(h) regarding personal jurisdiction, and we now recognize its logical extension to correspond with the rule we previously announced in *O'Brien*, *Lowery*, and *State Exchange Finance Corp.* A party must aver any issues of capacity that it believes merit setting a default judgment aside in order to preserve those questions for appeal should it choose to file a motion for Rule 60(b) relief.

D

The present case illustrates the problems attending ventilation of factual issues for the first time in a court of appeals. Swaim has moved to strike Moltan's capacity argument and the supporting documents appended to its brief. He also has requested that we take judicial notice of facts concerning Moltan's commencement of a lawsuit in the United States District Court for the Western District of Tennessee and a provision of the Indiana Code imposing a filing requirement upon entities doing business in Indiana under assumed names.

Moltan has correctly stated in reply to the motion to strike that a void judgment may be attacked directly or collaterally at any time in a motion under FED. R. CIV. P. 60(b)(4). Yet that is precisely what Moltan did. Moltan stated in its Rule 60(b) motion that the judgment was void due to allegedly ineffective service of process, but there was no mention of capacity or personal jurisdiction. It omitted the jurisdiction/capacity issue it now presents on appeal. Moltan's statement of the salient law thus fails either to resuscitate its argument or to address the concerns informing our decision.

In response to Swaim's request for judicial notice, Moltan has stated that B.J. Gurley appeared in the Tennessee litigation following questions about Moltan's capacity to sue, and, in any event, the facts alleged by Swaim do not preclude Moltan from raising capacity in the present case. Swaim and Moltan ask us to decide questions of fact that were never considered by the district court but might have been had they been raised at the proper time.

The upshot of all this? A party is free to devote its fifty pages (FED. R. APP. P. 28(g)) to whatever arguments it chooses; it is for us then to determine which issues are in play. As for the supporting documents, they are immaterial if the argument to which they pertain is forfeited. Requests for judicial notice are likewise material only to the extent that the noticed facts are relevant to an issue that we would decide in the case before us. In this case, Moltan has forfeited its jurisdiction/capacity argument, and we accordingly deny Swaim's motion to strike and requests for judicial notice as moot.

E

Our conclusion promotes the twin concerns of juridical efficiency and respect for the unique factfinding capability of a district court. Questions of capacity and personal jurisdiction will always turn, in part, upon findings of fact, and the district court is better equipped to make these determinations than is a court of appeals. This is not to deny our jurisdiction to entertain a direct appeal from a default judgment, *see* 28 U.S.C. § 1291, but when a party chooses to utilize the attention and limited resources of a district court in a motion under Rule 60(b), we think it just and proper that it be required to put before the district court whatever infirmities support setting aside the default judgment. This brings to bear the district court's factfinding function and unique knowledge of the case and maintains the court of appeals' role as a forum for resolving disputed questions of law – not fact.

III

A

Moltan's viable argument is that the default judgment is void for lack of personal jurisdiction because of ineffective service of process. Valid service of process is a prerequisite to a district court's assertion of personal jurisdiction. *Omni Capital Int'l v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 103, 108 S.Ct. 404, 409 (1987). Valid service of process comprises more than actual notice; it requires a legal basis for holding the defendant susceptible to service of the summons and complaint. *Id.*

In federal question cases, the statute giving rise to the cause of action may prescribe rules for service of process upon nonresident corporations and associations. But in the absence of any such provision, service of process is governed by the law of the state in which the district court is located. FED. R. CIV. P. 4(h), 4(e).[5] "Thus, under Rule 4(e), a federal court normally looks either to a federal statute or to the long-arm statute of the State in which it sits to determine whether a defendant is amenable to service." *Omni Capital*, 484 U.S. at 105, 108 S.Ct. at 410; *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 945 (7th Cir. 1992); *United Rope Distributors, Inc. v. Seatriumph*

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[5] The 1993 amendments to the Federal Rules consolidated in the new subdivision (e) the substantive provisions of former subdivisions (c)(2)(C)(i), (d)(1), and (e). This amendment did not take effect until after the attempts at service of process by Swaim upon Moltan. The new subdivision (e) made no substantive change with regard to the use of state service of process rules, and for the sake of convenience we refer to Rule 4(e) in examining the sufficiency of service of process in this case.

*Marine Corp.*, 930 F.2d 532, 535 (7th Cir. 1991). The federal courts are strictly bound in such cases by the letter of state law and are without authority to fill whatever interstitial gaps a given case may illuminate. *Omni Capital*, 484 U.S. at 108, 108 S.Ct. at 412.

The Age Discrimination in Employment Act does not provide for nationwide service of process, and one must therefore resort to Indiana law for service of process. The same rule that subjects Moltan to the jurisdiction of Indiana courts also states that service of process may be made as provided by Indiana Trial Rule 4.6. IND. CODE § 34, app. T.R. 4.4(B)(1). Under Rule 4.6, service upon a domestic or foreign organization may be effected by service upon an executive officer of the organization in accordance with the rules governing service on individuals set forth in Rule 4.1. In addition, Rule 4.4(B)(2) states that a person who is subject to Indiana jurisdiction under Rule 4.4(A) is "deemed to have appointed the Secretary of State as his agent upon whom service of summons may be made as provided in Rule 4.10." IND. CODE § 34, app. T.R. 4.4(B)(2). Thus Rules 4.1 and 4.10 outline the methods by which Moltan could have been served with process. *LaPalme v. Romero*, 621 N.E.2d 1102, 1104 (Ind. 1993).

B

Moltan claims that its status as a sole proprietorship exempts it from the scope of Trial Rule 4.6. One Indiana court has intimated that a sole proprietorship is not an organization within the meaning of Trial Rule 4.6. *Washington v. Allison*, 593 N.E.2d 1273, 1275 (Ind. Ct. App.

1992). Yet the dicta in that decision does not rescue Moltan from its intentional failure to acknowledge service. The same *Washington* court explicitly wrote that Trial Rules 4.1 and 4.6 are discretionary and therefore serve only to outline general guidelines for service of process:

> Ind. Trial Rules 4.1 and 4.6 provide that service *may be made* upon an individual, in the case of T.R. 4.1, or upon an organization, in the case of T.R. 4.6. In contrast, other rules provide that service *shall be made* upon certain parties in a designated manner. . . . The discretionary nature of T.R. 4.1 and T.R. 4.6, coupled with the provision in T.R. 4.15(F), . . . is evidence that personal jurisdiction is acquired by any method of service of summons which comports with due process.

593 N.E.2d at 1275. The court concluded that the party's status as a sole proprietorship was "not particularly significant" for the service of process issue. *Id.*

The Due Process Clause of the Fourteenth Amendment requires that service of process be reasonably calculated both to apprise a party of the pendency of an action and to provide it with an opportunity to respond. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652 (1950). Indiana has codified this requirement in its rules of trial procedure:

> No summons or the service thereof shall be set aside or be adjudged insufficient when either is reasonably calculated to inform the person to be served that an action has been instituted against him, the name of the court, and the time within which he is required to respond.

IND. CODE § 34, app. T.R. 4.15(F). Indiana courts employ an objective test in their service of process calculus: whether due process is satisfied depends on the form of service, not on whether the affected party was actually notified. *Glenmar Mercury-Lincoln, Inc. v. Riley*, 338 N.E.2d 670, 675 (Ind. Ct. App. 1975). Service of process that is reasonably calculated to inform, consistent with the letter of Trial Rule 4.15(F), is sufficient even if it fails to actually inform the party to which it is directed. *See Buck v. P.J.T.*, 394 N.E.2d 935, 936 (Ind. Ct. App. 1979). The focus of our inquiry is therefore whether the district court abused its discretion when it found that the three attempts at service were reasonably calculated to inform Moltan of the pending action.

C

The district court exercised sound discretion by entering the default judgment on January 18, 1994. It had evidence of three attempts at service by Swaim: two attempts at direct service and one attempt through the Indiana Secretary of State. We have already described the circumstances of each attempt and do not restate them here. A defaulted party must show a good faith reason for failing to appear, "meaning that we will grant relief only where the actions leading to the default were not willful, careless, or negligent." *Johnson*, 35 F.3d at 1117 (internal quotes and citations omitted). Moltan's conduct does not even approach this threshold.

Swaim's first attempt to serve Moltan accorded with the spirit and letter of the Indiana Trial Rules. *See, e.g., Precision Erecting, Inc. v. Wokurka*, 638 N.E.2d 472 (Ind. Ct.

App. 1994) (holding that plaintiff's own transmission of summons and complaint via certified mail was effective service of process). His second attempt was also legitimate, and we find that the district court was within its discretion in finding that Jean Black had authority to accept B.J. Gurley's official mail and that her refusal to do so was a breach of the duty mandated by Trial Rule 4.16. The third attempt was also within the letter of Indiana law because Moltan has appointed the Secretary of State as its agent for service of process. IND. CODE § 34, app. T.R. 4.4(B), 4.10. We agree with the district court that Moltan attempted "to evade service of process in violation of its duties pursuant to Indiana Trial Rule 4.16(A)."

The district court correctly relied upon Indiana Trial Rule 4.15. This rule reflects the discretionary character of the service of process provisions of the Indiana Trial Rules and consequently cures only technical defects in service and not total failure of service. *LaPalme*, 621 N.E.2d at 1106. It also requires a court to examine the entire record of attempted service to determine whether that service was sufficient.

> Because the literal requirements of Rules 4 through 4.13 represent the ideal as to the mechanics of preparing the summons . . . [and] the details of how each mode of service should be effectuated, . . . the reasonableness of the service actually employed shall be measured by the degree of compliance with those specifics.

*Glenmar Mercury-Lincoln, Inc.*, 338 N.E.2d at 675. Of course, a party may not disregard the language of the applicable Trial Rules, but neither is literal compliance with those rules necessary under Indiana law. The district

court found two technical defects in service and determined them cured by Rule 4.15; we endorse that decision.

The district court also wrote that Moltan willfully avoided the proper attempts at service. "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, [we] may not reverse it even though convinced that had [we] been sitting as the trier of fact, [we] would have weighed the evidence differently." *Anderson v. City of Bessemer City,* 470 U.S. 564, 573-74, 105 S.Ct. 1504, 1511-12 (1985). We will disturb only those factual findings that strike us as wrong with the "force of a five-week old, unrefrigerated dead fish." *United States v. Markling,* 7 F.3d 1309, 1319 (7th Cir. 1993), *cert. denied,* 115 S.Ct. 1327 (1995). What is rotten in this record is Moltan's continued effort to avoid service of process and frustrate the efficient administration of justice. Such circumstances warrant the use of default. *See United States v. DiMucci,* 879 F.2d 1488, 1493 (7th Cir. 1989).

IV

Moltan also appeals from the district court's order denying the motion for relief under FED. R. CIV. P. 55(c) and 60(b). A district court will grant relief from a final judgment pursuant to Rule 60(b) only in exceptional circumstances and has great latitude in which to make its decision. *See Tolliver v. Northrop Corp.,* 786 F.2d 316, 319 (7th Cir. 1986) ("The decision under 60(b) is discretion piled on discretion."). A court may vacate a default judgment when the moving party demonstrates (1) good cause for its default; (2) quick action to correct the

default; and (3) a meritorious defense to the plaintiff's complaint. *O'Brien*, 998 F.2d at 1401. Other factors necessarily influence the district court's decision. The court must weigh the burden on its docket, the legitimate reliance on the default by the nonmoving party, and the policy considerations favoring termination of stalled litigation against the possibility of injustice based, in part, upon the substantive merit of the nonmovant's claims and the moving party's proffered excuses for the default. *Dimmitt & Owens Fin., Inc. v. United States*, 787 F.2d 1186, 1193 (7th Cir. 1986).

The calculus involved in a Rule 60(b) decision leads us to give great deference to the district court's eventual decision. "With the standard of decision so multifaceted, the appellate court's ability to fault the district judge's application of the standard is quite limited, and the scope of effective judicial review is therefore slight." *Id.* The scope of our review is also narrow: we review only the Rule 60(b) decision itself for an abuse of discretion and will not visit the merits of the underlying default judgment. *Stafford*, 63 F.3d at 1450; *Pretzel & Stouffer*, 28 F.3d at 45.

The district court found that Moltan had failed to demonstrate the elements requisite to vacating the default judgment. We believe that the district court's lengthy entry explaining its denial of Moltan's Rule 60(b) motion evinces sound reasoning and judicious discretion. As we have previously discussed, Moltan has not identified good cause for its default; any further exposition would be superfluous. This lack of proof makes Moltan's quick action to cure the default immaterial and eliminates

the need for us to address the question of its allegedly meritorious defenses.

The default judgment and order denying appellant's motion for relief under FED. R. CIV. P. 60(b) are AFFIRMED.

A true Copy:
Teste:

---

*Clerk of the United States Court of Appeals for the Seventh Circuit*

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

| | | |
|---|---|---|
| **ROBERT SWAIM,** | ) | |
| **Plaintiff,** | ) | **CIVIL ACTION NO. IP93-742-C** |
| **v.** | ) | **(Filed Dec. 28, 1993)** |
| **MOLTAN COMPANY,** | ) | |
| **Defendant.** | ) | |

## REQUEST TO CLERK FOR ENTRY OF DEFAULT

Now comes the plaintiff, by counsel, pursuant to Rule 55 of the Federal Rules of Civil Procedure, and requests the Clerk to enter the default of the defendant Moltan Company. In support of this request, plaintiff would show the Clerk the facts that are established in the Affidavits of Barry A. Macey and Joseph E. Allman which are attached hereto and incorporated herein. Those documents incontrovertibly establish the following:

1. On June 7, 1993, plaintiff filed his complaint against the defendant.

2. Pursuant to Trial Rules 4.4(B) and 4.10, plaintiff, on September 3, 1993, served defendant with his complaint and summons by serving defendant's agent for service of process, the Indiana Secretary of State.

3. More than twenty days have elapsed since defendant has been served with the summons and complaint, and defendant has failed to appear or to take any other action in response to the summons and complaint.

**WHEREFORE**, plaintiff respectfully requests the Clerk to enter the default of the defendant for failure to plead or otherwise defend.

Respectfully submitted,

MACEY, MACEY AND SWANSON

/s/ Barry A. Macey
Barry A. Macey

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been duly served upon the following by United States first-class mail, postage prepaid, this 28th day of December, 1993.

B.J. Gurley
MOLTAN COMPANY
3555 Moltan Drive
Memphis, TN 38115-4431

/s/ Barry A. Macey
Barry A. Macey

MACEY, MACEY AND SWANSON
445 North Pennsylvania Street
Suite 401
Indianapolis, IN 46204
(317) 637-2345

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

| | | |
|---|---|---|
| **ROBERT SWAIM,** | ) | |
| **Plaintiff,** | ) | **CIVIL ACTION NO. IP93-742-C** |
| **v.** | ) | |
| **MOLTAN COMPANY,** | ) | |
| **Defendant.** | ) | |

## AFFIDAVIT OF BARRY A. MACEY

Barry A. Macey, being duly sworn upon his oath, deposes and states as follows:

1. My name is Barry A. Macey, and I am a partner in the law firm of MACEY, MACEY AND SWANSON, 445 North Pennsylvania Street, Suite 401, Indianapolis, Indiana.

2. On or about June 7, 1993 I filed an age discrimination complaint in the U.S. District Court on behalf of the above-named plaintiff, Robert Swaim, against his former employer, the Moltan Company.

3. On the same date that I filed the complaint, I asked Joseph Allman, who was then a clerk working in our office, to find out who the chief executive officer of the Moltan Company was so that we could serve the complaint. As Mr. Allman's affidavit, filed herewith, establishes, he telephoned the Moltan Company and learned that the chief executive officer is B.J. Gurley. Of note is the fact that in his conversation with the Moltan Company employee, Mr. Allman identified the name of

this law firm and stated that he needed the information in order to serve a complaint upon Moltan.

4. On June 7, 1993, I served B.J. Gurley, President of Moltan Company, by sending a copy of the complaint, summons and related materials by certified mail, return receipt requested, addressed to Mr. Gurley and the Moltan Company, 3555 Moltan Drive, Memphis Tennessee 38115. I know that the address to which the complaint and summons was sent is accurate because later in the month of June, 1993, I obtained from the Equal Employment Opportunity Commission all documents submitted by Moltan Company to the EEOC in response to Mr. Swaim's EEOC charge, and the stationery used by Moltan to file its position with the EEOC bears the address to which I sent the complaint and summons. I am attaching as group Exhibit A copies of the documents filed by Moltan with the EEOC on Moltan Company letterhead.

5. In the latter part of June 1993, I received the unopened envelope containing the complaint and summons returned to us by the U.S. Post Office as unclaimed. I am attaching as Exhibit B the envelope that I sent to Moltan Company that was returned as unclaimed.

6. Because our certified mail envelope was returned, I contracted with Express Process Servicing, Inc. [EPS], 200 South Meridian St., Suite 320, Indianapolis, Indiana to secure service of process on Moltan Company in Memphis, Tennessee.

7. On August 11, 1993, at 2:50 p.m., Theresa Moses, acting for EPS, appeared at the offices of Moltan Company, 3555 Moltan Drive, Memphis, Tennessee with a

complaint, summons, acknowledgment of service of process, notice, consent and civil cover sheet. She spoke with Jean Black, who is B.J. Gurley's secretary. Ms. Black refused to take the documents, and Ms Moses left the documents at her feet. Within the next several days, Moltan Company mailed the documents back to Ms Moses' company, Mid South Subpoena Service, 30 North Third Street, Memphis, Tennessee.

8. EPS then sent me a completed and executed Affidavit of Process Server signed by Theresa Moses; a second Affidavit of Service on a Mid South Subpoena Service form, also executed by Ms Moses, which notes that the documents were left at Jean Black's feet and were later returned by mail to Mid South by Moltan Co.; and a summons in this case with a completed Return of Service section signed by Theresa Moses. These documents are attached as group Exhibit C.

9. Pursuant to Rule 4(c)(2)(C)(i) of the Federal Rules of Civil procedure, a summons and complaint "may be served upon a defendant . . . pursuant to the law of the State in which the district court is held . . . " Under Trial Rule 4.4(B) of the Indiana Rules of Court, "a person subject to the jurisdiction of the courts of this state- . . . shall be deemed to have appointed the Secretary of State as his agent upon whom service of summons may be made as provided in Rule 4.10." Trial Rule 4.10 of the Indiana Rules provides for the service of process upon the Secretary of State who then promptly sends the summons and complaint to the named defendant.

10. Pursuant to Trial Rules 4.4(B) and 4.10, plaintiff, on September 3, 1993, served the Indiana Secretary of

State as defendant's agent for service of process. The Indiana Secretary of State then served Moltan Company by certified mail, return receipt requested. Once again, Moltan refused to claim the package, and it was returned on September 14, 1993 as unclaimed.

11. Moltan's failure to claim the package, however, does not defeat service, as pursuant to Trial Rule 4.4(B), the Secretary of State is deemed to be Moltan's agent for service of process. Accordingly, Moltan was served on September 3, 1993.

12. Although defendant has repeatedly attempted to avoid service by refusing envelopes mailed from Indiana and by refusing to accept the envelope that was hand delivered by Theresa Moses, service has been completed. I believe that Moltan was effectively served when, on August 11, 1993, the summons and complaint were left at the feet of Jean Black, secretary to Moltan's chief executive officer, B.J. Gurley. Even if that were not effective service, Moltan was incontrovertibly served on September 3, 1993 through its agent for service of process, the Indiana Secretary of State.

I affirm under the penalty of perjury that the foregoing is a true and accurate statement of the events contained therein.

/s/ Barry A. Macey
Barry A. Macey

STATE OF INDIANA )
) SS.
COUNTY OF MARION )

Before me the undersigned, a Notary Public for Marion County, State of Indiana, personally appeared Barry

A. Macey and he being first duly sworn by me upon his oath, says that the facts alleged in the foregoing instrument are true.

Signed and sealed this 28 day of December, 1993.

My Commission Expires:
11-14-97

/s/ Maria C. Dicken
Maria Dicken
County of Residence:
Marion

---

**EXHIBIT A**

[LOGO]

3555 MOLTAN DRIVE • MEMPHIS, TN 38115-4431

(901) 755-5666 Toll Free (800) 264-5826

January 20, 1993

Mr. Thomas P. Hadfield, Director
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Indianapolis District Office
101 West Ohio Street
Suite 1900
Indianapolis, Indiana 46204-4203

SUBJECT: CHARGE OF DISCRIMINATION - CHARGE #240930445 FILED BY: ROBERT D. SWAIM

Dear Mr. Hadfield:

Pertinent to above referenced subject and your request for a statement identifying the MOLTAN COMPANY'S position in conjunction with this charge, the information following identifies the situations resulting in the termination of Mr. Robert D. Swaim.

Mr. Swaim was hired as a Regional Manager in our Consumer Products Division in March 1, 1990 where he reported directly to Mr. W. Richard Salter, Vice President/Consumer Products Division.

Further to the attached letter by Mr. Salter explaining in detail Mr. Swaim's employ with our company, it should also be noted that sales in the Consumer products Division have been on a steady decline for the past few years. Our records can substantiate this statement.

Also enclosed is a copy of the Letter of Recommendation written for Mr. Swaim at the time of his termination which stated his professional involvement with our company. At no time during his employ, or release of employ, did age have any bearing on his, or any other employee's, stability with this company.

Should there be any further information I may provide you, please give me a call at the toll free number shown on this letterhead.

Thank you.
Sincerely,
MOLTAN COMPANY
/s/ Claude Bell
Claude Bell
Controller

CB/Jbb
Enclosures

---

Is your RETURN ADDRESS completed on the reverse side?

**SENDER:**
- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):
1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

B.J. Gurley
Moltan Company
3555 Moltan Drive
Memphis, TN 38115

4a. Article Number
P 057 671 243

4b. Service Type
☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail ☐ Return Receipt for Merchandise

7. Date of Delivery

5. Signature (Addressee)

8. Addressee's Address (Only if requested and fee is paid)

6. Signature (Agent)

PS Form 3811, December 1991 ☆ U.S.G.P.O.: 1992-307-530 DOMESTIC RETURN RECEIPT

Thank you for using Return Receipt Service.

App. 29

CERTIFIED
P 057 671 243
MAIL

RETURNED TO SENDER
REASON CHECKED
Refused
Unclaimed
Moved, left no address
Attempted, not known
Insufficient Address
No such number/street
No such office in state
Do not remail in this envelope

MACEY, MACEY AND SWANSON
445 N. PENNSYLVANIA STREET, SUITE 401
INDIANAPOLIS, INDIANA 46204

INDIANAPOLIS IN JUN 1993
PERMIT 1889444
U.S. POSTAGE
1.75

NL RUP
6-11-93 BW 154

EXHIBIT
B

TO:
B.J. Gurley
Molton Company
3555 Moltan Drive
Memphis, TN 38115

FIRST CLASS MAIL

4/3

BEST AVAILABLE COPY

**EXHIBIT C**

**Affidavit of Process Server**

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF INDIANA
(NAME OF COURT)

ROBERT SWAIM vs MOLTAN COMPANY IP93-742 C
PLAINTIFF/PETITIONER DEFENDANT/ RESPONDENT CASE #

I declare that I am a citizen of the United States, over the age of eighteen and not a party to this action. And that within the boundaries of the state where service was effected, I was authorized by law to perform said service.

**Service:** I served B. J. GURLEY, MOLTAN COMPANY
NAME OF PERSON/ENTITY BEING SERVED
with the (documents)
ALIAS SUMMONS, NOTICE & ACKNOWLEDGEMENT FOR SERVICE, COMPLAINT WITH JURY DEMAND, NOTICE, CONSENT, CIVIL COVER SHEET

by serving Jean Black Secretary
NAME RELATIONSHIP

at ___ Home _____

X Business 3555 Moltan, Memphis TN

on 8-11-93 at 2:50 pm
DATE TIME

Thereafter copies of the documents were mailed by prepaid, first class mail on _____
DATE

from _____ .
CITY STATE

**Manner of Service:** X By personally delivering copies to the person/authorized agent of entity being serviced.

___ By leaving, during office hours, copies at the office of the person/entity being served, leaving same with the person apparently in charge thereof.

___ By leaving copies at the dwelling house or usual place of abode of the person being served, with a member of the household 18 or older and explaining the general nature of the papers.

___ By posting copies in a conspicuous manner to the address of the person/entity being served.

**Non-Service:** After due search, careful inquiry and diligent attempts at the address(es) listed above, I have been unable to effect process upon the person/entity being served because of the following reason(s):

___ **Unknown at Address**
___ **Address Does Not Exist**
___ **Evading**
___ **Service Cancelled by Litigant**
___ **Moved, Left no Forwarding**
___ **Unable to Serve in a Timely Fashion**
___ **Other:**

**Service Attempts:**

Service was attempted on:

( ) _____.
DATE TIME

( ) _____.
DATE TIME

( ) _____.
DATE TIME

( ) _____.
DATE TIME

( ) _____.
DATE TIME

Description: Age: 60ish Sex: F Race: W

Hgt: 5' Wgt: 100 lb. Hair: Red/Brown Glasses: yes
I declare under penalty of perjury that the information contained herein is true and correct and this affidavit was executed on
8-11-93 at Memphis, TN
DATE CITY STATE

/s/ Theresa Moses
SIGNATURE OF PROCESS SERVER
*Express Process Service, Inc.*

State of TN

County of Shelby

subscribed and sworn before me, a notary public, this 13 day of Aug. 1993

**WITNESS MY HAND AND OFFICIAL SEAL TO**

County of Residence: Shelby
Commission Expires: 7/9/96

/s/ Catherine Berretta Catherine Berretta
signed NOTARY PUBLIC printed

**LOGO**

**(317) 639-4638**
fax (317) 266-1209
200 S. Meridian St., #320 Indianapolis, IN 46225

**MID SOUTH SUBPOENA SERVICE**

30 NORTH THIRD STREET
MEMPHIS, TN 38103

AFFIDAVIT OF SERVICE

STATE OF TENNESSEE COUNTY OF SHELBY

I, THERESA MOSES, FIRST BEING DULY SWORN MAKES OATH AS FOLLOWS:

I HAVE PERSONALLY SERVED THE DOCUMENT(S) ON THE RECIPIENT.

COURT NAME: U.S. District Ct

*RECIPIENT: BJ Gurley, Moltan Co/served Jean Black for Moltan Co.

DOCUMENT #: IP93-742 C

DATE OF SERVICE: 8-11-93

TIME OF SERVICE: 2:50 PM

ADDRESS OF SERVICE: 3555 Moltan Dr., Memphis, TN

I HAVE SERVED SAID DOCUMENT IN COMPLIANCE WITH ALL THE LAWS OF THE STATE OF TENNESSEE AND THE RULES OR COURT. I HAVE FURTHER NOTIFIED THE RECIPIENT THAT THIS MATTER IS SET FOR HEARING AT THE PLACE STATED ON THE DOCUMENT.

* Served Jean Black, BJ Gurley's secretary, for Moltan Co. She refused to accept service and I left copy of summons and complaint at her feet. Summons and complaint were returned to us by mail by Moltan Co.

THE 11 DAY OF AUG. , 1993, AT ___ O'CLOCK, AM/PM

/s/ Theresa Moses

SWORN TO ME THIS 16 DAY OF Aug. , 1993.

MY COMMISSION EXPIRES: 7/9/96

/s/ Catherine Berretta
NOTARY PUBLIC

---

AO 440 (Rev 1/90) Summons in a Civil Action

**UNITED STATES DISTRICT COURT**

SOUTHERN DISTRICT OF INDIANA

ROBERT SWAIM

V.

MOLTAN COMPANY

ALIAS
**SUMMONS IN A CIVIL ACTION**

CASE NUMBER:
IP93-742 C

TO: (Name and Address of Defendant)

B. J. Gurley
Moltan Company
3555 Moltan Drive
Memphis, TN 38115

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

Barry A. Macey
MACEY, MACEY AND SWANSON
445 N. Pennsylvania Street, Suite 401
Indianapolis, IN 46204
(317) 637-2345

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

| /s/ Illegible | July 29, 1993 |
|---|---|
| CLERK | DATE |

/s/ Starleen Ganz
BY DEPUTY CLERK

---

AO 440 (Rev 1/90) Summons in a Civil Action

**RETURN OF SERVICE**

Service of the Summons and Complaint was made by me[1]
DATE 8-11-93

NAME OF SERVER (PRINT)
Theresa Moses

TITLE
PPS

*Check one box below to indicate appropriate method of service*

X Served personally upon the defendant. Place where served: 3555 Moltan Dr., Memphis, TN

___ Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.

---

[1] As to who may serve a summons see Rule 4 of the Federal Rules of Civil Procedure.

Name of person with whom the summons and complaint were left: _____

___ Returned unexecuted: _____

___ Other (specify): _____

**STATEMENT OF SERVICE FEES**

TRAVEL SERVICES TOTAL

**DECLARATION OF SERVER**

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on 8-11-93 /s/ Theresa Moses
*Date* *Signature of Server*

EXPRESS PROCESS SERVICE, INC.

30 N 3rd, Memphis, TN
*Address of Server*

_____

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

| | | |
|---|---|---|
| **ROBERT SWAIM,** | ) | |
| **Plaintiff,** | ) | |
| **v.** | ) | **CIVIL ACTION** |
| **MOLTAN COMPANY,** | ) | **NO. IP93-742-C** |
| **Defendant.** | ) | |

**ENTRY OF DEFAULT**

It appearing that the defendant, Moltan Company, is in default because it has been properly served and has failed to plead or otherwise defend within the time prescribed by law;

Default is hereby entered against the defendant, Moltan Company, this 29 day of December, 1993.

/s/ Christopher F. Wright
Clerk, United States District Court

Copies to:

Barry A. Macey
MACEY, MACEY AND SWANSON
445 N. Pennsylvania Street
Suite 401
Indianapolis, IN 46204

B.J. Gurley
MOLTAN COMPANY
3555 Moltan Drive
Memphis, TN 38115-4431

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

| | | |
|---|---|---|
| **ROBERT SWAIM,** | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **CIVIL ACTION** |
| **MOLTAN COMPANY,** | ) | **NO. IP93-742-C** |
| | ) | |
| **Defendant.** | ) | |

## MOTION FOR DEFAULT JUDGMENT

Now comes the plaintiff, by counsel, pursuant to Rule 55 of the Federal Rules of Civil Procedure, and moves the Court to enter a default judgment against the defendant, Moltan Company in the amount of $197,733.04 plus attorney's fees and costs in the amount of $4681.75. In support of this motion, plaintiff would show the Court the following facts that are established in the Affidavits of Robert Swaim, Barry A. Macey and Joseph E. Allman which are attached hereto and incorporated herein as well as by documents in the Court's file. Those documents incontrovertibly establish the following:

1. Plaintiff's date of birth is February 16, 1932. He was employed by defendant as a regional sales manager from March 1, 1990 to August 14, 1992 when he was terminated. Swaim affidavit, ¶¶ 1-4.

2. On June 7, 1993, plaintiff filed his complaint against the defendant alleging that he had been terminated because of his age in violation of the Age Discrimination in Employment Act (ADEA) and further alleging that defendant's conduct was a willful violation of the

ADEA entitling plaintiff to liquidated damages. As relief, plaintiff sought, *inter alia* back pay and benefits, front pay and attorneys fees. Complaint.

3. On June 7, 1993, plaintiff's complaint was served on the chief executive officer of Moltan Company, B.J. Gurley, by certified mail, return receipt requested, addressed to B.J. Gurley, Moltan Company, 3555 Moltan Drive, Memphis, Tennessee 38115. There is no question that this is the Company's correct address, as it is the address on the Company's stationery and it is the address at which a process server later found Mr. Gurley's secretary. Nevertheless, the envelope was returned to plaintiff's attorney as unclaimed. It should be noted that before the envelope was sent, an employee of MACEY, MACEY AND SWANSON, the firm of plaintiff's attorney, telephoned Moltan Company to obtain the name of its chief executive officer and in the course of his conversation advised the Moltan employee with whom he spoke that the law firm was serving a complaint on Moltan. Macey Affidavit, ¶¶ 3-5 and Exs. A and B; Allman Affidavit. This sequence of events supports the inference that when the envelope arrived in Memphis, Moltan Company employees realized that it contained a complaint and summons and refused to accept it.

4. Because the envelope was returned, plaintiff's counsel engaged the services of a company specializing in process servicing, Express Process Servicing, Inc. [EPS], 200 South Meridian Street, Suite 320, Indianapolis, IN. EPS arranged to have the summons and complaint personally served by an employee of a Memphis firm, Mid South Subpoena Service, 30 North Third Street, Memphis, Tennessee. On August 11, 1993, at 2:50 p.m.,

Theresa Moses appeared at the offices of Moltan Company, 3555 Moltan Drive, Memphis, Tennessee with the complaint, summons, acknowledgment of service of process, notice, consent and civil cover sheet. She spoke with Jean Black who is B.J. Gurley's secretary. Ms Black refused to take the documents, and Ms Moses left the documents at her feet. Within the next several days, Moltan Company mailed the documents back to Ms Moses' company, Mid South Subpoena Service. Macey Affidavit, ¶¶ 6-8 and Ex. C.

5. Pursuant to Rule 4(c)(2)(C)(i) of the Federal Rules of Civil Procedure, a summons and complaint "may be served upon a defendant . . . pursuant to the law of the State in which the district court is held . . . " Under Trial Rule 4.4(B) of the Indiana Rules of Court, "a person subject to the jurisdiction of the courts of this state . . . shall be deemed to have appointed the Secretary of State as his agent upon whom service of summons may be made as provided in Rule 4.10." Indiana Trial Rule 4.10 provides for the service of process upon the Indiana Secretary of State who then promptly sends the summons and complaint to the named defendant.

6. Pursuant to Indiana Trial Rules 4.4(B) and 4.10, plaintiff, on September 3, 1993, served defendant with his complaint and summons by serving defendant's agent for service of process, the Indiana Secretary of State. The Indiana Secretary of State then sent the summons and complaint by certified mail, return receipt requested to Moltan. Once again, Moltan refused to claim the envelope, and it was returned on or about September 14, 1993. *See* Request For Service Upon Secretary of State and affidavit of employee of Secretary of State in Court file.

7. Moltan's failure to accept the envelope, however, does not defeat service, as pursuant to Indiana Trial Rule 4.4(B), the Secretary of State is deemed to be Moltan's agent for service of process. Accordingly, Moltan has clearly been served.

8. As more than twenty days had elapsed since defendant had been served with the summons and complaint, and defendant had failed to appear or to take any other action in response to the summons and complaint, plaintiff, on December 28, 1993, requested the Clerk to enter the default of the defendant. A copy of plaintiff's Request To Clerk For Entry Of Default was served, by first class mail, on B.J. Gurley, Moltan Company, 3555 Moltan Drive, Memphis, Tennessee. The envelope was not returned, but defendant has still failed to appear or to take any other action.

9. On December 29, 1993, the Clerk entered the default of the defendant.

10. Plaintiff's damages are established by his affidavit. To date, plaintiff has lost $57,741.52 in lost salary and employment benefits. Because plaintiff is entitled to liquidated damages under the ADEA. *See* 29 U.S.C. § 626. Accordingly, plaintiff's back pay and benefit losses and liquidated damages equal $115,483.04. In addition, because of defendant's unlawful conduct, plaintiff will reasonably lose an additional $82,250.00 in future earnings between the present and when he plans to retire at age 65 in February, 1997. Plaintiff's total damages, then, equal $197,733.04.

11. Plaintiff's attorneys fees are established by the affidavit of Barry A. Macey. The affidavit establishes that

plaintiff's attorneys have expended 25.75 hours in the prosecution of plaintiff's claim. It further establishes that $185 per hour is a reasonable rate for plaintiff's attorney, Barry A. Macey, and $125 per hour is a reasonable rate for Diana Ensign, an associate in the firm of MACEY, MACEY AND SWANSON. Accordingly, plaintiff is entitled to an attorney's fee award in the amount of $4681.75.

**WHEREFORE,** plaintiff respectfully requests the Court to enter default judgment against the defendant in the amount of $197,733.04 and to award him $4681.75 in attorney's fees and costs.

Respectfully submitted,

MACEY, MACEY AND SWANSON

/s/ Barry A. Macey
Barry A. Macey

MACEY, MACEY AND SWANSON
445 N. Pennsylvania Street
Suite 401
Indianapolis, IN 46204
Phone: (317) 637-2345

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

| | | |
|---|---|---|
| **ROBERT SWAIM,** | ) | |
| **Plaintiff,** | ) | |
| **v.** | ) | **CIVIL ACTION** |
| **MOLTAN COMPANY,** | ) | **NO. IP93-742-C** |
| **Defendant.** | ) | |

## JUDGMENT

Now before the Court is the Motion For Default Judgment filed by plaintiff. The Court has reviewed plaintiff's Motion for Default Judgment and the supporting affidavits filed therewith, and it appears that the defendant has been properly served despite its willful attempts to avoid service of process in this matter. As defendant has failed to defend or appear within the time prescribed by law, default judgment should be entered against it.

It is therefore ORDERED, ADJUDGED and DECREED that plaintiff should be and is hereby awarded judgment against the defendant Moltan Company in the amount of $197,733.04. In addition, plaintiff is awarded $4681.75 in attorneys fees and costs.

**DATED: JAN 18 1994**

**John Daniel Tinder**
Judge, U.S. District Court
Southern District of Indiana

DISTRIBUTION TO:

Barry A. Macey
MACEY, MACEY AND SWANSON
445 North Pennsylvania Street
Suite 401
Indianapolis, IN 46204-1800

B.J. Gurley
MOLTAN COMPANY
3555 Moltan Drive
Memphis, TN 38115-4431

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

---

ROBERT SWAIM,

Plaintiff,

vs. Civil Action No. IP93-742-C

MOLTAN COMPANY,

Defendant.

---

MOTION TO SET ASIDE ENTRY OF DEFAULT
AND DEFAULT JUDGMENT AND TO
PERMIT LATE FILING OF ANSWER

---

The Defendant, Moltan Company ("Moltan") hereby moves the Court pursuant to the provisions of FRCP Rules 55(c) and 60(b) to set aside the Entry of Default entered in this cause by the Clerk of Court on December 29, 1993, as well as to set aside the Default Judgment entered in this cause on January 18, 1994 (the "Judgment"), and to permit the late filing of its Answer, a copy of which is attached hereto as Exhibit "A". In support of its Motion, Moltan states as follows:

1. On June 7, 1993, the Plaintiff, Robert Swaim ("Swaim"), filed his Complaint in this cause, naming Moltan as the sole Defendant.

2. Service of Process on Moltan was not properly obtained by Swaim.

3. Moltan's first notice of the filing of the Complaint in this case came shortly after December 28, 1993, when

Swaim sent a copy of his Request for Entry of Default to B. J. Gurley by first class United States Mail.

4. Because Service of Process was not obtained on Moltan, Swain [sic] was not entitled to entry of a judgment, pursuant to FRCP Rule 55.

5. Because the circumstances surrounding the alleged service of process on Moltan indicates that a mistake existed as to perfection of that service of process, Moltan is entitled to relief from the judgment as contemplated by FRCP Rule 60(b).

6. Without proper service of process on Moltan, the Judgment is void, and Moltan is entitled to relief from the Judgment as contemplated by FRCP Rule 60(b).

7. Any questions relating to service of process on Moltan will be answered and cured by setting aside the Judgment and permitting Moltan's Answer attached hereto as Exhibit "B" to be filed.

8. Moltan has acted promptly under the circumstances and it knows of no prejudice that would be sustained by Swaim if this Motion were to be granted by the Court. In addition, Moltan believes it has meritorious defenses to Swaim's Complaint, as set forth in the attached Answer, which would prevent Swaim's recovery, in the event the Judgment were to be set aside and this matter were to proceed on the merits.

9. Good cause therefore exists for the granting of Moltan's Motion.

WHEREFORE, PREMISES CONSIDERED, MOLTAN PRAYS AS FOLLOWS:

A. That the Entry of Default entered in this case on December 29, 1993 be set aside.

B. That the Default Judgment entered in this cause on January 18, 1994 be set aside.

C. That Moltan be permitted to file its Answer attached hereto.

/s/ John D. Horne
John D. Horne,
Attorney for Defendant
Moltan Company
6060 Poplar, Suite 295
Memphis, TN 38119
(901) 685-9222

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true copy of the foregoing Motion to Set Aside Entry of Default and Default Judgment and to Permit Late Filing of Answer has been forwarded, via U.S. Mail, postage prepaid to Barry A. Macey, Attorney for Plaintiff, Suite 401, 445 N. Pennsylvania Street, Indianapolis, IN 46204.

This the 28th day of January, 1994.

/s/ John D. Horne
Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

---

ROBERT SWAIM,

Plaintiff,

vs. Civil Action No. IP93-742-C

MOLTAN COMPANY,

Defendant. (Filed Feb. 1, 1994)

---

AFFIDAVIT OF B. J. GURLEY IN SUPPORT OF MOTION TO SET ASIDE ENTRY OF DEFAULT AND DEFAULT JUDGMENT AND TO PERMIT LATE FILING OF ANSWER

---

STATE OF FLORIDA §

COUNTY OF LEE §

B. J. Gurley, being first duly sworn states as follows:

1. I am the Chief Executive Officer of Moltan Company ("Moltan") which maintains its principal business offices at 3555 Moltan Drive, Memphis, Tennessee. On June 7, 1993, the Plaintiff, Robert Swaim ("Swaim"), filed his Complaint in this cause, naming Moltan as the sole Defendant.

2. Swaim did not attempt to obtain a waiver of service upon Moltan pursuant to the provisions of FRCP Rule 4(d). Swain [sic] did not send B. J. Gurley or Moltan a copy of his complaint by first class mail as provided by FRCP Rule (4)(d)(2), (B) and (C).

3. While Swaim named Moltan as the sole Defendant, his attempts at service were directed to B. J. Gurley, an individual, at 3555 Moltan Drive, Memphis, Tennessee 38119, the business address of Moltan. (See Exhibits "B and "C" to Swaim's Motion for Default filed January 12, 1994).

4. 3555 Moltan Drive, Memphis, Tennessee is not B. J. Gurley's dwelling house or usual place of abode.

5. While Jean Black is the secretary at Moltan who attends to Moltan's business matters in which B. J. Gurley is involved, she has been given no authority to accept service of legal papers which are to be received by B. J. Gurley, individually.

6. Neither B. J. Gurley nor Moltan received Swaim's summons in this case until shortly after December 28, 1993. While Trial Rule 4.1(A) of the Indiana Rules of Trial Procedure may have permitted Swain [sic] to attempt service of the Alias Summons and Complaint in the manner described in Exhibit C to Swaim's Motion for Default, Swaim did not thereafter mail a copy of the Alias Summons with a statement relating to its manner of service to B. J. Gurley or Moltan at 3555 Moltan Drive, Memphis, Tennessee 38115, as required by Trial Rule 4.1(B) of the Indiana Rules of Trial Procedure.

7. The first knowledge of either Moltan or B. J. Gurley of the filing of Swaim's Complaint in this case came when Swaim's Request for Entry of Default that was mailed by Swaim's attorney on December 28, 1993 to B. J. Gurley at 3555 Moltan Drive, Memphis, Tennessee 38115 by first class United States Mail was received. See attached Exhibit "A." A photocopy of the Alias Summons

purporting to have been personally served on B. J. Gurley on August 11, 1993 was attached as Exhibit C to the Request for Entry of Default.

8. Shortly thereafter, a copy of the Notice of Entry of Default dated December 29, 1993 was mailed by the Clerk of Court by first class United States Mail to B. J. Gurley. See attached Exhibit "B". Moltan's attorney was thereafter contacted, and Moltan's attorney thereafter contacted Swaim's attorney. At the request of Moltan's attorney, Swaim's attorney then furnished copies of Swaim's Complaint, Swaim's Motion for Default Judgment, and the Default Judgment entered by the Court on January 18, 1994 to Moltan's attorney. Those copies were sent to Moltan's attorney by Federal Express on January 22, 1994 and were received on January 24, 1994. See attached Exhibit "C".

9. Under the circumstances, there has been confusion regarding how Moltan was to be notified of the commencement of this case. Moltan responded promptly when this matter was being investigated by the Equal Employment Opportunity Commission Office in Indianapolis and had Moltan been aware of the commencement of this case, it would have entered an appearance and filed a responsive pleading. Moltan has attached as Exhibit "A" to its Motion to Set Aside Default an Answer which it proposes to file in this case, assuming leave were to be granted by the Court.

10. Moltan has acted promptly under these circumstances, and it knows of no prejudice that would be sustained by Swaim if this Motion were to be granted by the Court. In addition, Moltan believes it has meritorious

defenses to Swaim's Complaint, as set forth in the attached Answer, which would prevent Swaim's recovery, in the event the Default Judgment were to be set aside and this matter were to proceed on the merits.

/s/ B. J. Gurley
B. J. Gurley

SWORN TO AND SUBSCRIBED before me this 28th day of January, 1994.

[SEAL] /s/ Patricia L. Nave
Notary Public

PATRICIA L. NAVE
MY COMMISSION # CC 263393
EXPIRES: February 13, 1997
Bonded Thru Notary Public Underwriters

My Commission Expires:

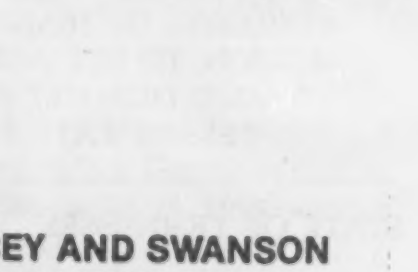
CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true copy of the foregoing Sworn Affidavit of B. J. Gurley in Support of Motion to Set Aside Entry of Default and Default Judgment has been forwarded, via U.S. Mail, postage prepaid to Barry A. Macey, Attorney for Plaintiff, Suite 401, 445 N. Pennsylvania Street, Indianapolis, IN 46204.

This the ___ day of ___, 1994.

Attorney

# EXHIBIT A



MACEY, MACEY AND SWANSON
445 N. PENNSYLVANIA STREET, SUITE 401
INDIANAPOLIS, INDIANA 46204

TO: B.J. Gurley
MOLTON COMPANY
3555 Moltan Drive
Memphis TN 38115-4431

FIRST CLASS MAIL

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

---

ROBERT SWAIM,

Plaintiff,

vs. Civil Action No. IP93-742-C

MOLTAN COMPANY,

Defendant. (Filed Feb. 1, 1994)

---

AFFIDAVIT OF JEAN BLACK IN SUPPORT OF MOTION TO SET ASIDE ENTRY OF DEFAULT AND DEFAULT JUDGMENT AND TO PERMIT LATE FILING OF ANSWER

---

STATE OF TENNESSEE §

COUNTY OF SHELBY §

Jean Black, being first duly sworn, states as follows:

1. I am employed by Moltan Company, 3555 Moltan Drive, Memphis, Tennessee 38115 as a secretary to B. J. Gurley. I have been continuously employed in that capacity for approximately 8 1/2 years.

2. On August 10, 1993, a process server came to the Moltan offices at 3555 Moltan Drive, Memphis, Tennessee 38115, asking for B. J. Gurley. B. J. Gurley was not in the Moltan office that day. I met the process server and advised her that B. J. Gurley was not in the office, and she left. On August 1[illegible], 1993, another process server appeared and again B. J. Gurley was not at the Moltan office.

3. The second process server told me he had some legal papers to serve on B. J. Gurley. I told the process server that I had no authority to accept legal papers for B. J. Gurley individually. I do not and have not been given that authority by B. J. Gurley.

4. Notwithstanding my statements to the process server he dropped the papers on the floor and left the Moltan offices. I attempted to return the papers that he had dropped on the floor to the process server but I was unsuccessful. I then mailed those papers back to the process server.

5. In my employment capacity with Moltan, I receive first class mail addressed to B. J. Gurley as well as to Moltan. Until shortly after December 28, 1993, when I received an envelope from Barry Macey addressed to B. J. Gurley, a copy of which is attached hereto as Exhibit "A", I had received no mail, either first class or certified, relating to this lawsuit.

/s/ Jean Black
Jean Black

SWORN TO AND SUBSCRIBED before me this 28 day of January, 1994.

/s/ Barbara M. Illegible
Notary Public

12-26-94
My Commission Expires:

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true copy of the foregoing Sworn Affidavit of Jean Black in Support of Motion to Set Aside Entry of Default and Default Judgment has been forwarded, via U.S. Mail, postage prepaid to Barry A. Macey, Attorney for Plaintiff, Suite 401, 445 N. Pennsylvania Street, Indianapolis, IN 46204.

This the 28th day of January, 1994.

/s/ John D. Horne
Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

---

ROBERT SWAIM,
Plaintiff,

vs.

MOLTAN COMPANY,
Defendant.

Civil Action No. IP93-742-C

(Filed Feb. 1, 1994)

---

MEMORANDUM IN SUPPORT OF MOTION TO SET ASIDE ENTRY OF DEFAULT AND DEFAULT JUDGMENT

---

1. *Factual Background.* The Plaintiff, Robert Swaim ("Swaim") was employed by the Defendant, Moltan Company ("Moltan") as a regional sales manager from March 1, 1990, until August 14, 1992. Answer, ¶ 3. Swaim was employed by Moltan to service its geographic sales area that included the States of Tennessee, Georgia, Alabama, Mississippi, Louisiana, Arkansas, Kansas, and Missouri. *Id.* Until approximately September of 1991, Swaim had serviced his sales area from his home in Nashville, Tennessee; however, in September of 1991, Swaim advised Moltan that he would marry an Indianapolis attorney and that he wanted to move his base to Indianapolis. *Id.* Moltan reluctantly agreed on the condition that Swaim accomplish sales objectives. *Id.*

Swaim later moved to Indianapolis and Moltan attempted to help Swaim by modifying his sales territory; however, his employment was terminated by Moltan on

August 14, 1992. Moltan contends that Swaim failed to satisfactorily perform his employment duties. Swaim contends that his employment was terminated as an act of age discrimination.

Swaim filed administrative charges with the Indianapolis Office of the EEOC on December 23, 1992, alleging age discrimination. Complaint, Ex. A. Swaim filed his complaint in this case on June 7, 1993. There is nothing in the record to indicate when any notices of Swaim's intent to sue were provided as required by 29 USC § 633a(d).

2. *Procedural Background*. Upon filing his Complaint, Swaim caused a summons and a copy of his Complaint to be sent by certified mail, return receipt requested, to

B. J. Gurley
Moltan Company
3555 Moltan Drive
Memphis, TN 38115

Request for Entry of Default, Ex. A.

The Summons and Complaint were not delivered but were returned by the Post Office marked "unclaimed." *Id.* No attempt was made by Swaim to obtain a waiver of service by Moltan pursuant to FRCP Rule 4(d). On August 11, 1993, Swaim had a private process server go to the business offices of Moltan at 3555 Moltan Drive, Memphis, Tennessee 38115, with the intention of serving an alias summons and the complaint on

B. J. Gurley
Moltan Company
3555 Moltan Drive
Memphis, TN 38115 *Id.* Ex. B.

After Jean Black, Moltan's secretary for B. J. Gurley advised the process server that B. J. Gurley was not in the office, and that she was not authorized to accept service of legal papers for B. J. Gurley individually, the alias summons and complaint were dropped on the floor by the process server, who then left the office. Black Affidavit ¶¶ 3 & 4. Thereafter, Jean Black mailed the legal papers dropped by the process server back to the process server. Black Affidavit ¶ 4; Request for Entry of Default, Ex. C. Thereafter, the process server filed affidavits and notations on the alias summons that B. J. Gurley had been personally served on August 11, 1993. *Id.* The process server did not note that the purported service was attempted on an individual at the individual's place of business, and not at the individual's usual residence or place of abode. *Id.* Neither did the process server note that Jean Black stated that she did not have authority to accept service of legal papers for B. J. Gurley, individually. *Id.*; Black Affidavit ¶ 3; Gurley Affidavit ¶ 5.

On December 28, 1993, Swaim filed a Request for Entry of Default, to which he attached copies of his purported service of process on Moltan. On December 28, 1993, Swaim mailed a copy of the Request for Entry of Default by first class mail to:

B. J. Gurley
Moltan Company
3555 Moltan Drive
Memphis, TN 38115

On December 29, 1993, the Clerk of Court entered Default in favor of Swaim. A copy of the Entry of Default was mailed by the Clerk of Court by first class mail to:

B. J. Gurley
Moltan Company
3555 Moltan Drive
Memphis, TN 38115

On January 12, 1994, Swaim filed his Motion for Default Judgment. In that Motion, Swaim inferred that Moltan had been served with process. Motion for Default, ¶ 3. On January 18, 1994, the Court awarded a Default Judgment to Swaim. Moltan has now moved the Court to set aside the Entry of Default, to set aside the Default Judgment, and to permit the late filing of its Answer.

3. *Issue.* Should Moltan be granted the requested relief under FRCP Rule 55(b) and 60(b)?

4. *Argument and Statement of Authority.*

The Court is authorized to set aside the entry of default for "good cause shown." FRCP Rule 55(c). The Court is also authorized to set aside the entry of a Default Judgment where the judgment may be void, where excusable neglect may exist, or where other reasons justify relief from the operation of the judgment. FRCP Rule 60(b)(1)(4) & (6).

In determining whether good cause is shown, the District Court should take a liberal approach. *Coon v. Grenier,* 867 F.2d 73 (1st Cir. 1989); see also *Mendoza v. Wight Vineyard Management,* 783 F.2d 941 (9th Cir. 1986). In determining whether good cause exists, the majority of circuits look to such guidelines as whether the default was willful, whether relief from the judgment would prejudice the nonmovant, or whether the movant has presented a meritorious defense. *Id.* In determining whether good cause to set aside a default exists, the

Court should also look, in addition to the presence of a meritorious defense, to how promptly the movant acted to have a default set aside. *Zuelzke Tool Engineering Co., Inc. v. Anderson Die Castings, Inc.*, 925 F.2d 226 (7th Cir. 1991).

Moltan has submitted an Answer for which it has requested permission for late filing. That Answer contains numerous meritorious defenses, the most important of which is whether Swaim has allowed the appropriate Statute of Limitations in his alleged age discrimination claim to run. Answer, ¶ 15. In addition, it is apparent from a review of all the papers submitted in this matter that Moltan did act promptly once it had actual notice of Swaim's lawsuit.

In this case, service of process initiated by the Plaintiff appears confused. Moltan's first knowledge of the pendency of this lawsuit came shortly after December 28, 1993 when B. J. Gurley received Notice of Entry of Default that Swaim's attorney mailed by first class mail to 3555 Moltan Drive, Memphis, Tennessee. Gurley Affidavit, ¶ 6. No attempts were made by Swaim to obtain a waiver of service under FRCP Rule 4(d). Once Moltan learned of the Entry of Default, it promptly moved the Court for relief from the Judgment and for leave to file its answer, in which it asserted meritorious defenses. In addition, no prejudice has been shown by the Plaintiff that should prevent this dispute from proceeding on the merits rather than on procedural technicalities. *Adriana International Corp. v. Thoeren*, 913 F.2d 1406 (9th Cir. 1990); cert. den. 111 S.Ct. 1019, 112 L.ED2d 110 (1991). Under all of the circumstances, the Defendant respectfully submits

that good cause has been shown and that the Defendant's Motion should be granted.

Moltan also argues that the Judgment may be void, because of the lack of service of process on Moltan as required. Guidance for service of process appears in FRCP Rule 4, which provides for expediting service by waiver, for service following federal procedural guidelines, and for service following state procedural guidelines. FRCP Rule 4(d), (e), and (h). Swaim made no attempt to obtain a waiver of service from Moltan under FRCP Rule 4(d). Under Indiana procedural law, service on an individual could have been effected as follows:

> **(A) In general.** Service may be made upon an individual, or an individual acting in a representative capacity by:
>
> > (1) Sending a copy of the summons and complaint by registered or certified mail or other public means by which a written acknowledgement or receipt may be requested and obtained to his residence, place of business or employment with return receipt requested and returned showing receipt of the letter; or
> >
> > (2) Delivering a copy of the summons and complaint to him personally; or
> >
> > (3) Leaving a copy of the summons and complaint at his dwelling house or usual place of abode; or
> >
> > (4) Serving his agent as provided by rule, statute or valid agreement.
>
> **(B) Copy of service to be followed with mail.** Whenever service is made under subsection (3)

> or (4) of subdivision (A), the person making the service also shall send by first class mail, a copy of the summons without the complaint to the last known address of the person being served, and this fact shall be shown upon the return. [As amended December 7, 1970, effective January 1, 1971]. FRCP Rule 4(e)(1); Indiana Rules of Trial Procedure, Trial Rule 4.1.

Under FRCP Rule 4(e)(2), service on an individual could have also been effected as follows:

> ***(e) Service Upon Individuals Within a Judicial District of the United States.*** Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States.
>
> > (2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process. FRCP Rule 4(e)(2).

Swaim alleges that his process server personally served Moltan, but the record shows instead that service was attempted on an individual – Gurley – at Gurley's business address, not at Gurley's residence or usual place of abode. FRCP Rule 4(e)(2); Ind. Trial Rule 4.1(A). The record also reflects that service was made on Jean Black,

an alleged "agent" who had no authority to accept service on B. J. Gurley personal legal matters, at B. J. Gurley's place of business. Gurley Affidavit, ¶ 5; Black Affidavit ¶ 3. No follow-up by first class mail to Gurley, if Gurley had been the named Defendant, rather than Moltan, was made as required. Trial Rule 4.1(B). Despite Swaim's assertions, Trial Rule 4.10 would not have been appropriate because that rule relates to service upon the Secretary of State or other governmental agent. Trial Rule 4.10.

Swaim named Moltan as the Defendant, not Gurley. From that point on, his service of process was confused. Process appeared to be directed to Gurley, not Moltan. Process made no reference to serving Gurley, as chief executive officer of Moltan, or to serving Moltan, by delivering a copy to its chief executive officer, Gurley. With the entry of the Default Judgment, Swaim, who failed to follow simple rules of pleading and service, and whose claims now appear to be subject to serious meritorious challenges by Moltan, has gained an unfair procedural advantage, all as a result of his questionable notice. The basic legal principal that lawsuits should be decided upon their merits and not be resolved by Default Judgment requires that the Judgment in this case be set aside. *Adriana International,* supra. Moltan has defended Swaim's charges once before the EEOC, and as can be seen by the tender of its Answer, it stands ready, willing and able to defend against Swaim's claims in this Court.

5. *Conclusion.* Given the questionable and confused "service" in this case, given the meritorious defenses pleaded in Moltan's proposed Answer and given the promptness with which Moltan has appeared and

responded to this Court, once it received notice of the pendency of this action, good cause for relief has been shown. The Entry of Default should be set aside, the Default Judgment should be set aside, and the Answer should be ordered filed, and this matter should be decided on its merits.

THE WINCHESTER LAW FIRM

/s/ John D. Horne
John D. Horne (#4815)
6060 Poplar, Suite 295
Memphis, TN 38119
(901) 685-9222

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true copy of the foregoing Memorandum in Support of Motion to Set Aside Entry of Default and Default Judgment and to Permit Late Filing of Answer has been forwarded, via U.S. Mail, postage prepaid to Barry A. Macey, Attorney for Plaintiff, Suite 401, 445 N. Pennsylvania Street, Indianapolis, IN 46204.

This the 28th day of January, 1994.

/s/ John D. Horne
Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

| | | |
|---|---|---|
| ROBERT SWAIM, | ) | |
| Plaintiff, | ) | |
| vs. | ) | IP 93-742C |
| MOLTAN COMPANY, | ) | |
| Defendant. | ) | |

**ORDER DENYING MOTION TO SET ASIDE DEFAULT JUDGMENT**

Pursuant to Rule 58 of the Federal Rules of Civil Procedure and for the reasons discussed in the entry accompanying this order, Defendant Moltan Company's motion to set aside the default judgment is **DENIED.** Furthermore, Defendant's motion for leave to file an answer is **DENIED AS MOOT.**

ALL OF WHICH IS ORDERED this 23rd day of November 1994.

/s/ John Daniel Tinder
John Daniel Tinder, Judge
United States District Court

Copies to:

John D. Horne
6060 Poplar, Suite 295
Memphis, Tennessee 38119

Barry A. Macey
Suite 401
445 N. Pennsylvania Street
Indianapolis, Indiana 46204

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

| | | |
|---|---|---|
| ROBERT SWAIM, | ) | |
| Plaintiff, | ) | |
| vs. | ) | IP 93-742C |
| MOLTAN COMPANY, | ) | |
| Defendant. | ) | |

**Entry Discussing Defendant's Motion to Vacate Default Judgment**

## I. Introduction

This matter comes before the court on Defendant's motion to vacate a default judgment entered on December 29, 1993. Defendant, Moltan Company, moves to set aside the default judgment pursuant to Rules 55(c) and 60(b) of the Federal Rules of Civil Procedure. Having considered the briefs and exhibits of both parties, the court finds that Defendant's motion to set aside the default judgment should be **DENIED.**

## II. Background and Procedural History

Plaintiff, Robert Swaim ("Swaim"), filed a complaint against Defendant, Moltan Company ("Moltan"), his former employer. Swain alleged that he was terminated because of his age in violation of the Age Discrimination in Employment Act ("ADEA").

Plaintiff made several attempts to serve Defendant with a copy of the summons and complaint as required

by Rule 4 of the Federal Rules of Civil Procedure. Rule 4 allows service of process in the manner prescribed by federal law or "pursuant to the law of the State in which the district court is held for the service of summons." FED. R. CIV. P. 4(e)(1).

First, pursuant to Indiana Trial Rule 4.1(A)(1),[1] a complaint and summons were sent, by certified mail, to Moltan Company, addressed to its chief executive officer ("CEO"), B.J. Gurley ("Gurley"). Although the envelope was appropriately addressed, no one at Moltan signed for it. When no one would sign for the letter, the postman left a notice of arrival for Gurley and took the envelope back to the post office. Pursuant to the Domestic Mail Manual, the letter was held at the post office for five days, and a final notice of delivery was sent to Moltan. When the envelope was not claimed within fifteen days, it was returned to Plaintiff's counsel.

A second method of service of process was then attempted. Pursuant to Indiana Trial Rule 4.1(A)(2), Plaintiff attempted to have the summons and complaint personally served on the CEO of Moltan by a firm specializing in service of process. The process server appeared at the offices of Moltan and spoke to Jean Black ("Black"), Gurley's secretary. Black refused to accept service. The process server then left the documents at Black's feet. The documents were mailed back to the process server several days later.

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[1] Rule 4.6 specifically discusses service of process on organizations. The rule states that service should be made upon an executive officer or registered agent in accordance with the rules that govern service on an individual.

Swaim attempted service of process a third time utilizing yet another method of service of process. Pursuant to Indiana Rules 4.4(b) and 4.10, Plaintiff served the Secretary of State as the agent of the corporation. The Secretary of State sent the complaint and summons by certified mail to the CEO of the Defendant company to the correct address. The complaint and summons were later returned to the Secretary of State.

Defendant did not file a timely answer to this lawsuit. Approximately two months after the last attempt at service of process, Plaintiff filed his request to the clerk for entry of default. A copy of the request with supporting documents was served on Moltan by first class mail addressed to B.J. Gurley in the same manner as the Plaintiff's correspondence at the same address to which the earlier summons and complaint had been directed. The clerk entered a default on December 29, 1993, and sent a copy of that entry to Moltan also addressed in the same manner and mailed to the same address by first class mail. On January 12, 1994, Plaintiff filed a motion for default judgment. On January 18, 1994, the court entered judgment against Moltan.

On January 21, 1994, counsel for Plaintiff received a telephone call from attorney John D. Horne of Memphis, Tennessee, who stated that he represented Moltan Company. Mr. Horne requested a copy of the complaint. A copy of the complaint, the motion for default judgment and the default judgment were sent to him by Federal Express on Saturday, January 22, 1994, for delivery on Monday, January 24, 1994.

On January 28, 1994, Defendant's counsel filed his appearance and a motion to set aside entry of default and default judgment and to permit late filing of answer.

## III. Standard

Defendant moves to set aside entry of default and default judgment pursuant to Rules 55(c) and 60(b) of the Federal Rules of Civil Procedure. Rule 55(c) is the applicable standard to set aside an entry of default, FED. R. CIV. P. 55(c), and Rule 60(b) is the standard to set aside a default judgment, FED. R. CIV. P. 60(b). Because judgment was entered in this matter on January 18, 1994, the court will apply the Rule 60(b) standard. "While the tests are identical under either Rule 55(c) or Rule 60(b), respect for the finality of judgments results in the application of the test under Rule 60(b) circumstances – where a default *judgment* has been entered – to be much more limited and stringent." *Jones v. Phipps*, No. 93-3157, slip op. at 6 (7th Cir. Nov. 2, 1994).

Rule 60(b)(1) provides that "[o]n a motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding" upon a showing of "mistake, inadvertence, surprise, or excusable neglect." FED. R. CIV. P. 60(b)(1). The moving party must show: (1) good cause for the default; (2) quick action to correct the default; and (3) the existence of a meritorious defense to the original complaint. *Pretzel & Stouffer v. Imperial Adjusters*, 28 F.3d 42, 45 (7th Cir. 1991). This is a narrow test, allowing for a default judgment to be set aside only in limited circumstances. *Jones*, slip op. at 6-7. The rule, "by its very terms, establishes a high

hurdle for parties seeking to avoid default judgments and requires something more compelling than ordinary lapses of diligence or simple neglect to justify disturbing a default judgment. *Id.*

## IV. Discussion

As set forth above, in order to prevail upon its motion, Defendant must show: (1) good cause for the default; (2) quick action to correct the default; and (3) a meritorious defense to the underlying claim. *Pretzel & Stouffer*, 28 F.3d at 45. Each of these elements will be addressed in turn.

### A. Good Cause

Moltan has failed to show good cause to justify its default. Moltan asserts that it had good cause to default because service of process was never accomplished. Although service of process was never perfectly accomplished because the company continually returned the summons and complaint, the court finds that because service was substantially accomplished and because Defendant actively evaded such service, Defendant has failed to show good cause.

#### 1. Evasive Acts of Defendant

The court finds that Defendant has not shown good cause for its failure to respond to the default judgment because the Defendant actively evaded service of process. As the court noted in the entry of default judgment,

Plaintiff persistently attempted to serve Defendant, yet all three attempts failed. Plaintiff addressed the envelopes correctly and served them at the right address, yet in all cases Defendant refused service.

Plaintiff's first attempt at service of process was through certified mail to the CEO of the company at the company's office. The rule authorizes service by certified mail on an executive officer of the organization. IND. T. R. 4.6(A)(1). The envelope was not restricted in delivery so any one with authority to sign for the company's registered mail could have done so. *See LaPalme v. Romero*, 621 N.E.2d 1102, 1106 (Ind. 1993). It seems strange that certified mail was delivered at the appropriate address, yet no one signed for it. Additionally, notice was left with Gurley that the certified mail was at the post office to be picked up. Neither Gurley nor any one from Moltan ever retrieved the letter. There is no reason this letter should have been refused.

Plaintiff attempted to re-serve Defendant by having a process server hand deliver a copy of the complaint and summons to the CEO of Defendant company. The CEO's secretary refused to accept service of process, so the process server simply left the summons and complaint at her feet. Defendant asserts that Black did not accept service because the service was addressed to:

> B.J. Gurley
> Moltan Company
> 3555 Moltan Drive
> Memphis, TN 38115

Defendant states that this address was confusing because it was addressed to B.J. Gurley, not Moltan Co. c/o B.J.

Gurley. Black refused service and mailed back the summons and complaint to the process server.

Black should have accepted service of process. She was a de facto agent of Gurley in his official capacity. Black told the process server that she did not have the authority to accept service of process for B.J. Gurley individually. (Aff. of Black ¶ 5.) Defendant's Brief similarly states that Black "had no authority to accept service on B.J. Gurley's personal legal matters." (Def.'s Brief in Support of Motion to Set Aside Entry of Default and Default Judgment at 7.) These statements imply, and one would assume that Black had the authority to accept official mail. Furthermore, the notice of request for entry of default and the court entry of default which were addressed exactly the same as Plaintiff's certified mail were received and opened. Therefore, the court finds that Black had the authority to accept Gurley's official mail. With this authority comes the duties outlined in Ind. Trial Rule 4.16. The secretary was authorized to receive the papers for the corporation in its official capacity, but refused to do so.

Plaintiff's third attempt at service was service on Defendant's agent the Secretary of State.[2] Under Indiana Trial Rule 4.4 an organization submits to the jurisdiction of the courts of this state by doing any business in the state. Moltan did business in the state, Swaim was located here to sell Moltan's supplies in the state of Indiana. Therefore, Moltan was subject to jurisdiction for these

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[2] Defendant's only response to show that this method of service was not effective is to state that this is the method for service upon the Secretary of State.

acts. Under Rule 4.4(B) a person subject to the jurisdiction of the state "shall be deemed to have appointed the secretary of state as his agent upon whom service of summons may be made as provided in Rule 4.10." IND. R. TRIAL P. 4.4(B). Service under Rule 4.10 requires a plaintiff to provide a copy of the summons and complaint, a statement from the attorney stating why service on the Secretary is appropriate, and the defendant's address. Plaintiff complied fully with this rule. Because Moltan appointed the Secretary of State as its agent, service on the Secretary of State was an appropriate way to comply with service. Plaintiff provided the Secretary the appropriate mailing address for the Moltan corporation. Again, there is no reason to justify this refusal of service of process.

These repeated groundless refusals of service of process demonstrate that Defendant was attempting to evade service of process in violation of its duties pursuant to Indiana Trial Rule 4.16(A).

**2. Adequate Service of Process**

As stated above, technical service of process was never completed because each of the three times service was attempted on the correct person, at the correct address, service and refused. Because service was refused, the burden was again on Swaim to attempt service by other means pursuant to Indiana Trial Rule 4.11. However, the court finds that the failure of service of process each of these times was technical failure of service of process that was cured under Rule 4.15(F).

Rule 4.15(F) provides that service of process is sufficient if it is reasonably calculated to inform Defendant of the lawsuit. IND. TRIAL R. 4.15(F). This rule cures technical failure of service of process, not total failure of service of process. *Overhauser v. Fowler,* 549 N.E.2d 71, 73 (Ind. Ct. App. 1990). Courts interpret this rule to be coextensive with the Due Process requirements that a defendant must receive notice before being subject to the jurisdiction of the court. If service was reasonably calculated to inform a defendant of the lawsuit, such service is deemed adequate to confer personal jurisdiction. *Glennar Mercury-Lincoln, Inc. v. Riley,* 338 N.E.2d 675 (Ind. Ct. App. 1975); *see also Storm v. Mills,* 556 N.E.2d 965 (Ind. Ct. App. 1990). This is true even if "the party served lacks actual knowledge of the suit." *Glennar Mercury-Lincoln,* 338 N.E.2d at 675. For example, in *Storm,* the court found that service was adequate where the plaintiff attempted service at the location where the defendant ran a business at the time of her accident and where she reasonably believed he continued to work. The court found that service in this manner was reasonably calculated to inform the defendant of the lawsuit. *Storm,* 556 N.E.2d at 968.

In this case, there were basically two technical defects in Plaintiff's service on Moltan. The first was that service was addressed to B.J. Gurley, Moltan Company rather than Moltan Company c/o B.J. Gurley, or ATTN: B.J. Gurley. Although this may not have been as precise as the form of address the defense would like, it does not constitute total failure of service of process. Certainly examination of the summons itself and the complaint would give notice to a reasonable reader that Moltan was

the defendant. B.J. Gurley, as the CEO, was the appropriate person to be served with the summons and complaint against the company pursuant to Indiana Trial Rule 4.6 and the company was served at the correct location. A reasonable person would have accepted service. Therefore, this method is reasonably calculated to inform a defendant that a lawsuit has been initiated against it. *Glennar Mercury-Lincoln, Inc.*, 338 N.E.2d at 675. Defendant's intentional dodging of these papers does not then afford it with the right to state that this method was not reasonably calculated to inform someone of the lawsuit.

Second, technically, the third time service of process was refused, Plaintiff should have initiated service of process again pursuant to Rule 4.11. However, the Plaintiff attempted service by three different methods, each method correct and yet service was refused. Plaintiff's options were limited. He could have served Gurley at his home under Indiana Rule 4.6(B); yet he had no reason to believe that method would be successful either. In addition, there is no evidence that the Plaintiff knew, or could have learned of, Gurley's home address. Because Moltan evaded service of process in violation of its duties pursuant to Rule 4.16 and because Plaintiff substantially complied with service requirements under the trial rules, service of process was adequate to provide Defendant with notice of the lawsuit and to confer jurisdiction for the default judgment.

The court finds that neither of these technical defects constitutes complete failure of service of process, that Plaintiff's attempts were reasonably calculated to inform a defendant that a lawsuit had been initiated against it.

Defendant has failed to establish good cause based on service of process.

Rejection of service of process by one authorized to accept service constitutes notice under the Indiana Rules. IND. T.R. 4.16(A). *See also Shotwell v. Cliff Hagan Ribeye Franchise*, 572 N.E.2d 487, 489 (Ind. 1991) (court upheld the constitutionality of an earlier version of the corporate statute that found the due process requirements were satisfied if the corporation rejected service of process through certified mail). Further, in support of its finding that service of process was sufficient to provide notice, the court notes that in *Spangler v. State*, 607 N.E.2d 720 (Ind. 1993), the court stated:

> If the process server attempts personal service, and the individual to be served refuses delivery, the refusal may not defeat a court's jurisdiction, since the person to be served is on notice of the pendency of some court proceeding, whether or not that person has actual knowledge of the particular proceeding.

*Id.* at 725. In this case, a person with authority to accept service of process refused to accept the service. That is not to say that any secretary of the corporation who refuses service is subjecting the corporation to the jurisdiction of a court. But where, as here, service was attempted upon the CEO of the corporation as required by the Indiana Rules, and his secretary who is authorized to receive such service refuses to do so, the defendant corporation is on notice. These three incidents were sufficient to reasonably inform defendant that an action had been filed against it.

**B. Quick Action**

The court notes that Defendant does satisfy the quick action requirement to vacate a default judgment. Default judgment was entered on January 18, 1994 and this motion to vacate the default judgment was filed on January 28, 1994. Therefore, Defendant made an adequate showing as to this element of its motion.

**C. Meritorious Defense**

Defendant also must show that it has a meritorious defense to the underlying substantive claim. Moltan raises a general denial of liability, but emphasizes another defense as meritorious in its brief.[3] The defense argument focuses on its claim that Swaim's lawsuit is time-barred. Defendant argues that under 42 U.S.C. § 2000(e)-5(f)(1), Plaintiff must wait for the expiration of 180 days and receipt of his right to sue letter before filing suit in federal court.

Plaintiff asserted a claim under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et

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[3] Defendant's Brief states "Moltan has submitted an Answer for which it has requested permission for late filing. That Answer contains numerous meritorious defenses, the most important of which is whether Swaim has allowed the appropriate Statute of Limitations in his alleged age discrimination to run." (Def's Mem. in Support of Motion to Set Aside Entry of Default J. at 5.) However, the only meritorious defense that Defendant discusses in its briefs is the statute of limitations defense. The Answer (which was not ever accepted by the court for filing) does not contain sufficient information for the court to determine if the other defenses are meritorious.

seq., not Title VII, as Defendant asserts. Although the ADEA was patterned after Title VII, they are clearly separate statutes. The applicable limits upon when a plaintiff may bring suit under the ADEA are found at 29 U.S.C. §§ .626(d) & 626(e). The only limits in the ADEA are that a plaintiff must wait for 60 days after filing a complaint with the Equal Employment Opportunity Commission ("EEOC") before filing suit and must file before 90 days after receiving notice from the EEOC. Plaintiff did this.

Defendant asserts that, at the very least there is a question of fact because Plaintiff had not yet received his notice from the EEOC when he filed this lawsuit. What Defendant alleges is a question of fact is actually a question of law. The applicable statute is very clear as to what limits apply. It is irrelevant that Plaintiff had yet to receive their notice from the EEOC; such receipt was not necessary for him to file this lawsuit.

Defendant has failed to show that Plaintiff's claim is time barred. Thus his showing of a meritorious defense is inadequate. Defendant's failure to show an adequate defense provides a separate basis to deny its motion to vacate the default judgment.

## V. Conclusion

Defendant has failed to show two of the three elements necessary to vacate a default judgment. First, it has not shown good cause because it cannot show that service of process was inadequate. Second, it does not state a meritorious defense in its allegation that Plaintiff's claim is time-barred. Therefore, Defendant's motion to set aside

the default judgment will be **DENIED.** Furthermore, Defendant's motion for leave to file an answer will be **DENIED AS MOOT.**

ALL OF WHICH IS ORDERED this 23rd day of November 1994.

/s/ John Daniel Tinder
John Daniel Tinder, Judge
United States District Court

Copies to:

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Barry A. Macey
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

| | | |
|---|---|---|
| ROBERT SWAIM, | ) | |
| Plaintiff, | ) | |
| vs. | ) | NO. IP 93-742-C |
| MOLTAN COMPANY, | ) | |
| Defendant. | ) | |

**ENTRY AND ORDER FOR DECEMBER 8, 1994**

This matter came before the Court for telephonic pretrial conferences, first on December 1, 1994, and then on December 7, 1994. At each conference, the plaintiff was represented by Barry A. Macey; and the defendant was represented by John D. Horne.

On December 1, 1994, counsel for the parties informed the Magistrate Judge in advance of the current hearing date for proceedings supplemental to judgment set on December 2, 1994 that the defendant had filed notice of appeal and would be requesting to stay execution pending appeal. Given the defendant's statement of the current status of the case, the parties' counsel and the Magistrate Judge thoroughly discussed the application of Federal Rules of Civil Procedure 62(d) and 67 to the facts of this case. both counsel stated in general terms what their clients' position would be in regard to the necessity for a supersedeas bond in this cause.

The hearing previously set for proceedings supplemental to execution that was to take place on December 2,

1994 was continued by the undersigned to give the defendant sufficient time to deposit into the registry of the Court a draft in the amount of $208,000.00, the amount the Court found to be reasonable in its sound discretion after the legal and factual discussions had been completed between the parties and the Court on December 1, 1994.

The Court informed the parties on December 1, 1994 that if they desired a formal hearing on the record, the same would be allowed as soon as the Court had received the defendant's motion pursuant to Rule 62 of the Federal Rules of Civil Procedure. Both parties informed the Court they did not desire a formal hearing and that if the check was received by the Court on or about December 7, 1994, that execution upon the judgment would be stayed, pending appeal, and requested that the Court order the funds presented by the defendant be deposited into the registry of the Court in an interest-bearing account as the supersedeas bond for the defendant pursuant to Rule 62 of the Federal Rules of Civil Procedure.

On December 7, 1994, the Magistrate Judge and counsel for the parties again had a telephonic pretrial conference wherein it was confirmed that the defendant had filed its Notice of Appeal and motion regarding either fixing a supersedeas bond or waiving same under Rule 62 of the Federal Rules of Civil Procedure. Defendant's counsel confirmed that he had forwarded a draft to the Clerk of the Court in the amount of $208,000.00.

On December 8, 1994, the Court confirmed that the Clerk had received defendant's draft in the amount of $208,000.00.

IT IS THEREFORE ORDERED that the draft in the amount of $208,000.00 be deposited into the registry of the Clerk of the Court in an interest-bearing account.

IT IS FURTHER ORDERED that the $208,000.00 deposited into the registry of the Court and interest accuring thereon in accordance with law is the supersedeas bond posted by the defendant to stay execution pursuant to Rule 62(d) of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that proceedings supplemental and/or any other form of execution are now STAYED in this cause.

IT IS SO ORDERED.

/s/ Kennard P. Foster
Kennard P. Foster, Magistrate Judge
United States District Court
Southern District of Indiana

cc:

Barry A. Macey, MACEY, MACEY AND SWANSON, 445 North Pennsylvania Street, Indianapolis, IN 46204

John D. Horne, THE WINCHESTER LAW FIRM, 6060 Poplar, Suite 295, Memphis, Tennessee 38119

## Trial Rule 4.1

### SUMMONS: SERVICE ON INDIVIDUALS

**(A) In general.** Service may be made upon an individual, or an individual acting in a representative capacity, by:

(1) Sending a copy of the summons and complaint by registered or certified mail or other public means by which a written acknowledgement or receipt may be requested and obtained to his residence, place of business or employment with return receipt requested and returned showing receipt of the letter; or

(2) Delivering a copy of the summons and complaint to him personally; or

(3) Leaving a copy of the summons and complaint at his dwelling house or usual place of abode[; or]

(4) Serving his agent as provided by rule, statute or valid agreement.

**(B) Copy service to be followed with mail.** Whenever service is made under subsection (3) or (4) of subdivision (A), the person making the service also shall send by first class mail, a copy of the summons without the complaint to the last known address of the person being served, and this fact shall be shown upon the return. [As amended December 7, 1970, effective January 1, 1971.]

## Trial Rule 4.4

### SERVICE UPON PERSONS IN ACTIONS FOR ACTS DONE IN THIS STATE OR HAVING AN EFFECT IN THIS STATE

**(A) Acts serving as a basis for jurisdiction.** Any person or organization that is a nonresident of this state, a resident of this state who has left the state, or a person whose residence is unknown, submits to the jurisdiction of the courts of this state as to any action arising from the following acts committed by him or his agent:

(1) Doing any business in this state;

(2) Causing personal injury or property damage by an act or omission done within this state;

(3) Causing personal injury or property damage in this state by an occurrence, act or omission done outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue or benefit from goods, materials, or services used, consumed, or rendered in this state;

(4) Having supplied or contracted to supply services rendered or to be rendered or goods or materials furnished or to be furnished in this state;

(5) Owning, using, or possessing any real property or an interest in real property within this state;

(6) Contracting to insure or act as surety for or on behalf of any person, property or risk located within this state at the time the contract was made; or

(7) Living in the marital relationship within the state notwithstanding subsequent departure from the state, as to all obligations for alimony, custody, child support, or property settlement, if the other party to

the marital relationship continues to reside in the state.

**(B) Manner of service.** A person subject to the jurisdiction of the courts of this state under this rule may be served with summons:

(1) As provided by Rules 4.1 (service on individuals), 4.5 (service upon resident who cannot be found or served within the state), 4.6 (service upon organizations), 4.9 (in rem actions); or

(2) The person shall be deemed to have appointed the secretary of state as his agent upon whom service of summons may be made as provided in Rule 4.10.

**(C) More convenient forum.** Jurisdiction under this rule is subject to the power of the court to order the litigation to be held elsewhere under such reasonable conditions as the court in its discretion may determine to be just.

In the exercise of that discretion the court may appropriately consider such factors as:

(1) Amenability to personal jurisdiction in this state and in any alternative forum of the parties to the action;

(2) Convenience to the parties and witnesses of the trial in this state in any alternative forum;

(3) Differences in conflict of law rules applicable in this state and in the alternative forum; or

(4) Any other factors having substantial bearing upon the selection of a convenient, reasonable and fair place of trial. [As amended December 7, 1970, effective January 1, 1971; amended and effective November 10, 1988.]

**Trial Rule 4.6**

SERVICE UPON ORGANIZATIONS

**(A) Persons to be served.** Service upon an organization may be made as follows:

(1) In the case of a domestic or foreign organization upon an executive officer thereof, or if there is an agent appointed or deemed by law to have been appointed to receive service, then upon such agent;

(2) In the case of a partnership, upon a general partner thereof;

(3) In the case of a state governmental organization upon the executive officer thereof and also upon the attorney general;

(4) In the case of a local governmental organization upon the executive thereof, and if a statute provides for an attorney to represent the local government organization, and an attorney occupies such position, then also upon such attorney;

(5) When, in subsections (3) and (4) of this subdivision, a governmental representative is named as a party in his individual name or in such name along with his official title, then also upon such representative.

**(B) Manner of service.** Service under subdivision (A) of this rule shall be made on the proper person in the manner provided by these rules, for service upon individuals, but a person seeking service or his attorney shall not knowingly direct service to be made at the person's dwelling house or place of abode, unless such is an address furnished under the requirements of a statute or valid agreement, or unless an affidavit on or attached to

the summons states that service in another manner is impractical.

**(C) Service at organization's office.** When shown upon an affidavit or in the return, that service upon organization cannot be made as provided in subdivision (A) or (B) of this rule, service may be made by leaving a copy of the summons and complaint at any office of such organization located within this state with the person in change of such office.

## Trial Rule 4.10

## SUMMONS: SERVICE UPON SECRETARY OF STATE OR OTHER GOVERNMENTAL AGENT

**(A) In general.** Whenever, under these rules or any statute, service is made upon the secretary of state or any other governmental organization or officer, as agent for the person being served, service may be made upon such agent as provided in this rule.

(1) The person seeking service or his attorney shall:

(a) Submit his request for service upon the agent in the praecipe for summons, and state that the governmental organization or officer is the agent of the person being served;

(b) State the address of the person being served as filed and recorded pursuant to a statute or valid agreement, or if no such address is known, then his last known mailing address, and, if no such address is known, then such shall be stated;

(c) Pay any fee prescribed by statute to be forwarded together with sufficient copies of the summons, affidavit and complaint, to the agent by the clerk of the court.

(2) Upon receipt thereof the agent shall promptly:

(a) Send to the person being served a copy of the summons and complaint by registered or certified mail or by other public means by which a written acknowledgement of receipt may be obtained;

(b) Complete and deliver to the clerk an affidavit showing the date of the mailing, or if there was no mailing, the reason therefor;

(c) Send to the clerk a copy of the return receipt along with a copy of the summons;

(d) File and retain a copy of the return receipt.

## Trial Rule 4.15

### SUMMONS: PROOF OF SERVICE – RETURN – AMENDMENTS – DEFECTS

**(A) Return – Form.** The person making service shall promptly make his return upon or attach it to a copy of the summons which shall be delivered to the clerk. The return shall be signed by the person making it, and shall include a statement:

(1) That service was made upon the person as required by law and the time, place, and manner thereof;

(2) If service was not made, the particular manner in which it was thwarted in terms of fact or in terms of law;

(3) Such other information as is expressly required by these rules.

**(B) Return and affidavits as evidence.** The return, along with the summons to which it is attached or is a part, the praecipe for summons, affidavits furnished with the summons or praecipe for summons, and all other affidavits permitted by these rules shall be filed by the clerk with the pleadings and other papers in the case and thereupon shall become a part of the record, and have such evidentiary effect as is now provided by law. Copies of such record shall be admissible in all actions and proceedings and may be entered in any public records when certified over the signature of the clerk or his deputy and the clerk's seal.

**(C) Proof of filing and issuance dates.** The clerk shall enter a filing date upon every praecipe, pleading, return, summons, affidavit or other paper filed with or

entered of record by him. The clerk shall also enter an issuance date upon any summons issued, mailed or delivered by him, or other communication served or transmitted by him under these rules. Such filing or issuance date shall constitute evidence of the date of filing or issuance without further authentication when entered in the court records, or when the paper or a copy thereof is otherwise properly offered or admitted into evidence.

**(D) Admission of service.** A written admission stating the date and place of service, signed by the person being served, may be filed with the clerk who shall file it with the pleadings. Such admission shall become a part of the record, constitute evidence of proper service, and shall be allowed as evidence in any action or proceeding.

**(E) Amendment.** At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended unless it clearly appears that material prejudice would result to the substantial rights of the person against whom the process is issued.

**(F) Defects in summons.** No summons or the service thereof shall be set aside or be adjudged insufficient when either is reasonably calculated to inform the person to be served that an action has been instituted against him, the name of the court, and the time within which he is required to respond.

**Trial Rule 4.16**

SUMMONS: DUTIES OF PERSONS TO AID IN SERVICE

(A) It shall be the duty of every person being served under these rules to cooperate, accept service, comply with the provisions of these rules, and, when service is made upon him personally, acknowledge receipt of the papers in writing over his signature.

(1) Offering or tendering the papers to the person being served and advising the person that he or she is being served is adequate service.

(2) A person who has refused to accept the offer or tender of the papers being served thereafter may not challenge the service of those papers.

(B) Anyone accepting service for another person is under a duty to:

(1) Promptly deliver the papers to that person;

(2) Promptly notify that person that he holds the papers for him; or

(3) Within a reasonable time, in writing, notify the clerk or person making the service that he has been unable to make such delivery of notice when such is the case.

(C) No person through whom service is made under these rules may impose any sanction, penalty, punishment, or discrimination whatsoever against the person being served because of such service. Any person wilfully violating any provision of this rule may be subjected to contempt proceedings. [As amended October 30, 1992, effective January 1, 1993.]